

*Personal*

THE UNITED STATES PATENT AND TRADEMARK OFFICE

Inventor : Mitchell R. Swartz

Serial no. 09/ 750,765

Filed: 12/28/00

For: **METHOD AND APPARATUS  
TO CONTROL ISOTOPIC FUEL  
LOADED WITHIN A MATERIAL**

This is a continuation of Serial no. 07/ 760,970

Group Art Unit: 3641

Examiner: Mr. Palabrica, R.J.

**RECEIVED**

JAN 13 2004

**GROUP 3600**

January 4, 2004

To Whom it Does Concern:  
Office of the Clerk  
Board Of Patent Appeals  
c/o The Commissioner for Patents  
Alexandria, VA 22313-1450

**NOTICE OF COMPLIANCE BY APPELLANT**

1. The Appellant thanks the Office for the very careful attention given to the Appeal Brief, as discussed in the Office's notification (Exhibit "A"), a copy of which is attached hereto. In response to said Office notification (Exhibit "A"), also attached hereto are

- i) Appellant's revised Appeal Brief (in triplicate),
- ii) containing a Certificate of Service on the last page thereof,
- iii) containing Appellant's Appendix of the Claims attached thereto,
- iv) Appellant's Certificate Of Mailing, and
- v) this Notice of Compliance by Appellant.

2. All matters cited by the Office have been addressed and corrected in the now-submitted revised Appeal Brief and in this Notice of Compliance.

3. The Office's notification states,

*"a. The statement of the Status of Claims is inconsistent with Appendix A (Claims Involved in the Appeal). Claims 11 and 20 are not listed in the Status Of Claims but they are listed in Appendix A."*

Appellant thanks the Examiner for this careful detail, and Appellant has corrected this misprint in Appendix A.

4. The Office's notification states,

*"b. The statement of Status of Amendments is confusing because it appears to refer to the original claim 5, instead of an amended claim 5"*

Appellant disputes the Examiner that this is confusing. Nonetheless, Appellant has complied and corrected this by adding the word "amended" exactly where the Examiner demands.

5. The Office's notification states,

*"c. The Summary of Invention is improper because it includes subject matter not found in the disclosure (e.g. see page 4, 2nd paragraph which is not recited in the Abstract)."*

**The TRUTH - The Cited lines are in the Application.**

The Examiner must be mistaken because these lines are in the original disclosure of the above-entitled application on page 3, lines 1 through 4. The Office knows this, and therefore, the attention of the Board and Court are directed to this statement by the Office.

This demand by the Examiner is inconsistent with the U.S. Supreme Court, which has ruled that any *pro se* litigant is entitled to less stringent standards [U.S. Rep volume 404, pages 520-521 (72)].

Nonetheless to comply with the Examiner who will not allow the Appellant the right to quote sentences and paragraphs from his own original application, the offending paragraph is now deleted. Appellant preserves his right to seek redress in federal court on this Constitutional, civil rights, and federal law matter.

6. The Office's notification states,

*"d. The recitation and scope of Issues is improper because it does not conform to MPEP 1206. For example, applicant does not specify the basis of the alleged unpatentability of the claims. An example of a proper way of phrasing an issue is as follows: 'Whether claims 1-20 are unpatentable under 35 U.S.C. 112, first paragraph, based on a nonenabling disclosure.'"*

**THE TRUTH - Every Issue Is Both Proper And Relevant To The Examiner's Past Rejections**

With all due respect, the Examiner is wrong for several reasons.

First, the Issues do appear to conform to MPEP 1206.

Second, the Examiner will have opportunity to advance the Office's arguments at bar.

Third, Appellant respectfully disputes this because each and every issue is phrased correctly.

Fourth, it is noted that these phrases and Issues have not been a problem for the Board previously, for the Federal US Court or the US Supreme Court (twice). The Appellant has a right to be concise, clear and accurate before the Board.

Fifth, Appellant respectfully disputes this because the Office is nonspecific, consistent with other disingenuity (*vide supra, vide infra*).

Sixth, notwithstanding the above, the Appellant conforms with the Examiner's suggestions and has rewritten the Issues.

Eighth, this demand of the Examiner is inconsistent with the U.S. Supreme Court, which has ruled that any *pro se* litigant is entitled to less stringent standards [U.S. Rep volume 404, pages 520-521 (72)].

7. The Office's notification states,

*"Other examples of impropriety include: a) associating operability of the claimed invention with 35 U.S.C. 112 1st and 2nd paragraphs issues; "*

**THE TRUTH - An Enabling Disclosure requires operability**

With all due respect, the Examiner is wrong for at least eight reasons.

First, there is no mention of operability of the claimed invention in the argument paragraphs of the 35 U.S.C. 112 2nd paragraphs issues.

Second, there is supposed to be mention of operability of the claimed invention in the argument paragraphs of the 35 U.S.C. 112 1st paragraphs issues because Appellant demonstrates that this was an enabling disclosure.

Third, Appellant respectfully disputes this because utility and USC 101 are not discussed on page 22 of the Appeal Brief, except through enablement.

Fourth, the Office's new statement contracts the Office's previous statements in the record. For ten years the Office has cited "operability" pursuant to 35 U.S.C, 112, first paragraph issues. All of a sudden, the Office's previous arguments that were reasonably consistent over more than a decade in this matter apparently are changed without a clear substantive explanation, authority, exhibit, or basis for the paroxysmal change.

Fifth, the effort of the Appellant argument is ignored. Where is the Office's response? Instead, the Office attempts to manipulate the argument for reasons unclear, but in the prism of misguided behavior and ignoring Declarations and Exhibits.

Sixth, Appellant respectfully disputes this because each and every matter of the invention of which this invention is a Continuation was already before the Board. The Appellant has a right to be concise, clear and accurate about what is before the Board.

Seventh, Appellant respectfully disputes this purported change by the Office because this is a new argument of the Office, and should have been made previously in the record.

Eighth, Appellant notes that the Examiner's use of the word "impropriety" is incorrect and is transference because it is their reliance upon false statements which has an appearance of impropriety. Whether a legal argument is valid is entirely at the discretion of the Board, and if necessary, the Court. By contrast, the systematic false statements by the Examiner violate federal law. Mailing false statements through the mail across federal lines is an impropriety.

Ninth, this allegation of the Examiner is inconsistent with the U.S. Supreme Court, which has ruled that any *pro se* litigant is entitled to less stringent standards [U.S. Rep volume 404, pages 520-521 (72)].

8. The Office's notification states,

*"b) improperly including terms not relevant to the grounds of rejection used by the examiner, e.g., 1.192q6)(v)' statements on 'disingenuous claim by the Office' etc.."*

The Office is wrong for at least several reasons. First, Appellant respectfully disputes this because the recitation of Issues under Appeal (paid for by the Appellant) is indeed proper. In the United States of America, there is a Constitutional right to Appeal. There is also the demand that federal employees abide by the law, Office rules, and must be truthful in federal documents. This has the appearance of impropriety if Appellant is not allowed to appeal because these issues were cited by Appellant (then Applicant) and were already made to the Office. Instead of substantively responding with specificity, as would be reasonably expected, the

Examiner is attempting to usurp Appellant's (and then, Applicant's) Constitutionally protected rights

Second, the Office is demanding that IT fashion the Appellant's issues. For some unknown reason, the Office now demands to control the thought, the Appeal, the issues, and the Arguments as of this date. That is unlawful and consistent with harassment, and in the prism of the Office ignoring Declarations and Exhibits, it has much more than an appearance of impropriety.

Third, Appellant notes that to copy with the Examiner's aversion to mention of the US Constitution, those words which offend the Office were removed. Now the Office wants to fashion Appellants Issues and Arguments (vide supra, vide infra). That is censorship, and in the prism of the Office ignoring Declarations and Exhibits, it is more.

Fourth, the claim that "Also, the Statement of Issues is still not limited to issues presented because it still contains arguments concerning the merits of issues." is made without a single substantive discussion, notice, or basis for the claim by the Examiner who apparently will yet again NOT allow an Appeal, nor will abide by the US Constitution, nor speak the truth, with respect to this matter.

Fifth, the Examiner has not followed the Rules. This is discussed in the Appeal Brief. The Appellant informed the Office that these would be brought before the Board. The Appellant has listed these in the correct order. It may be that the Examiner, Mr. Carone simply do not want the relevant issues to be before the Board or the Court, but Appellant is within his constitutional rights. Mr. Carone and the Examiner, and whoever approves their actions should be for these (and other) improprieties.

Sixth, notwithstanding the above, so as to fully comply with the Examiner, the Appellant has corrected this and removed these Issues which offend the Office as much as "United States Constitution).

In addition, this demand of the Examiner is inconsistent with the U.S. Supreme Court, which has ruled that any *pro se* litigant is entitled to less stringent standards [U.S. Rep volume 404, pages 520-521 (72)]. Therefore, Appellant preserves his right to seek redress in federal court on this Constitutional, civil rights, and federal law matter.

9. The Office's notification states,

*"e. The statement on Grouping of Claims is improper because it includes arguments as to why claims 1, 4 and 5 (sic) distinguish and limit the invention. These arguments should be in the Argument section."*

The Office is wrong for at least six reasons.

First, the statement on Grouping of Claims is relevant.

Second, the statement on Grouping of Claims is not argument, but is definition.

Third, the statement on Grouping of Claims was present to explain, and limit the invention for the Board.

Fourth, given the behavior of the Office, reasonable people can be certain that the statement on Grouping of Claims, if not present, would make the Appeal Brief deficient in the eyes of the Office, which is attempting to usurp the rights of the Appellate to justice.

Fifth, so inaccurate is the Office, that attention of the reviewer, the Board, and the Court if necessary, is now directed to the fact that independent claims are not "claims 1, 4 and 5" as the Examiner purports but Claims 1, 4 and 13.

Sixth, so inaccurate is the Office, that attention of the reviewer, the Board, and the Court if necessary, is now directed to the fact that independent claims discussed in the Grouping of Claims is not "claims 1, 4 and 5" as the Examiner purports, but Claims 1, 4 and 13. As Appellant stated, as follows in the Appeal Brief,

**"Claim 1 distinguishes and limits the invention, in a process for producing a product using a material which is electrochemically loaded with an isotopic fuel, to a method of controlling the loading which includes in combination, loading said isotopic fuel into said material, then providing means for producing a change in the quantity of said isotopic fuel within said material, creating thereby a catastrophic diffusion flux of said isotopic fuel within said material, providing a diffusion barrier to said diffusion flux of said isotopic fuel within said material, and thereby producing said product.**

**Claim 4 distinguishes and limits the invention, in a process using an isotopic fuel loaded into a material, to a two-stage method for controlling the loading which includes in combination loading said isotopic fuel into said material, then providing means for producing a change in the quantity of said isotopic fuel within said material, creating thereby a catastrophic diffusion flux of said isotopic fuel within said material.**

**Claim 13 distinguishes and further limits the invention to an apparatus to produce a product using a material loaded with an isotopic fuel, which includes in combination means to load said isotopic fuel into said material, means to produce a change in the quantity of said isotopic fuel within said material, means to produce a catastrophic diffusion flux of said isotopic fuel within said material, means thereby to produce said product."**

10. The Office's notification states,  
*"The Grouping of Claims section states that "the appealed claims do not stand or fall together." However there is no discussion in the Arguments section as to why EACH claim is considered separately patentable."*

**THE TRUTH - there is discussion in the Arguments section of why EACH claim is considered separately patentable**

The Office is wrong for at least four reasons.

First, despite the disingenuous statement of the Examiner, it is explicitly discussed on page 22 of the Argument section for 35 U.S.C. 112 (first paragraph), and then on page 92 of the Argument section for 35 U.S.C. 112 (second paragraph), and then on page 99 of the Argument section for 35 U.S.C. 102, and then on page 127 of the Argument section for 35 U.S.C. 101. In addition it was discussed on page 21.

Second Appellant respectfully disputes this because there is discussion in the Arguments section of why EACH claim is considered separately patentable.

Third, as Appellant stated,

**"Claim 1 distinguishes and limits the invention, in a process for producing a product using a material which is electrochemically loaded with an isotopic fuel, to a method of controlling the loading which includes in combination, loading said isotopic fuel into said material, then providing means for producing a change in the quantity of said isotopic fuel within said material, creating thereby a catastrophic diffusion flux of said isotopic fuel within said material, providing a diffusion barrier to said diffusion flux of said isotopic fuel within said material, and thereby producing said product."**

**Claim 4 distinguishes and limits the invention, in a process using an isotopic fuel loaded into a material, to a two-stage method for controlling the loading which includes in combination loading said isotopic fuel into said material, then providing means for producing a change in the quantity of said isotopic fuel within said material, creating thereby a catastrophic diffusion flux of said isotopic fuel within said material.**

**Claim 13 distinguishes and further limits the invention to an apparatus to produce a product using a material loaded with an isotopic fuel, which includes in combination means to load said isotopic fuel into said material, means to produce a change in the quantity of said isotopic fuel within said material, means to produce a catastrophic diffusion flux of said isotopic fuel within said material, means thereby to produce said product."**

Fourth, economy to the judiciary is important, and Appellant did not want to repeat each portion discussed on page 21 an additional four times. However, to please the Examiner and the Office, the Appellant has corrected this, as requested.

11. The Office's notification states,

*"f. Applicant's contentions in the Arguments section are improper. Examples of impropriety include: a) issues of operability and utility are improperly associated in arguments regarding the 35 U.S.C. 112, 1st paragraph rejection (see page 22 of the Brief)"*

**THE TRUTH - 35 U.S.C. 101 involves utility and not operability**

The Office is wrong for at least seven reasons.

First, Appellant respectfully disputes this because this is nonsense as utility and USC 101 are not discussed on page 22 of the Appeal Brief.

Second, the Office's new statement contradicts the Office's previous statements in the record. For ten years the Office has cited "operability" pursuant to 35 U.S.C. 112, first paragraph issues. All of a sudden, the Office's previous arguments that were reasonably consistent over more than a decade in this matter apparently are changed without a clear substantive explanation, authority, exhibit, or basis for the paroxysmal change.

Third, Appellant respectfully disputes this because a 35 U.S.C. 101 issue involves utility and not "operability". It is only connected with 35 USC 112 first paragraph in the legal definition of enablement. Appellant discussed this in detail in his arguments.

Fourth, the effort of the Appellant argument is ignored. Where is the Office's response? Instead, the Office attempts to manipulate the argument for reasons unclear, but in the prism of misguided behavior and ignoring Declarations and Exhibits.

Fifth, Appellant respectfully disputes this because each and every matter of the invention of which this invention is a Continuation was already before the Board. The Appellant has a right to be concise, clear and accurate about what is before the Board.

Sixth, Appellant respectfully disputes this purported change by the Office because this is a new argument of the Office, and should have been made previously in the record.

Seventh, Appellant notes that the Examiner's use of the word "impropriety" is incorrect and is transference because it is their reliance upon false statements which is the impropriety. Whether a legal argument is valid is up to the Board, and if necessary, the Court. By contrast, the systematic egregious false statements by the Examiner violate federal law.

In addition, this demand of the Examiner is inconsistent with the U.S. Supreme Court, which has ruled that any *pro se* litigant is entitled to less stringent standards [U.S. Rep volume 404, pages 520-521 (72)].

9 251  
12. The Examiner states,  
*"c) claims rejected under 35 U.S.C 112, 2nd paragraph are not correctly identified (e.g., see item 75, page 92)"*

**THE TRUTH - The claims were correctly identified.**

Appellant thanks the Examiner for this careful detail, but the Examiner is mistaken. Although a misprint, the claims were correctly identified. The Appeal Brief says:

"73..... all Claims 1-10, 12-19, 21, and 22 rejected under 35 U.S.C. 112 "  
below a heading of

**"ARGUMENT REGARDING 35 USC §112 SECOND PARAGRAPH"**

Therefore, the questions is "Were claims 1-10, 12-19, 21, and 22 rejected under 35 U.S.C. 112 second paragraph?". Exhibit "B" shows that the Examiner stated that "claims 1-10, 12-19, 21, and 22 rejected under 35 U.S.C. 112 second paragraph" in his rejection on page 27. Therefore, as the Examiner knows, in fact, the claims were stated correctly.

13. The Office's notification states,

*"b) arguments regarding 35 U.S.C. 112, 2nd paragraph, improperly discusses 35 U.S.C. 102(b) rejection of claims (e.g. see page: 92)"* ✓

**THE TRUTH - Discussion of 35 U.S.C. 102(b) is relevant to definiteness.**

The Appellant thanks the Examiner for this careful detail, but the Examiner is incorrect. The Board is directed to the fact that the record demonstrates that the Appellant had appealed on the Issue of "definiteness". Therefore, the Appellant is entitled to bring up an argument regarding the rejection of Claims 1-10, 12-19, 21 and 22 under 35 U.S.C. 112 second paragraph which states, -- as Appellant notes to the Board --

**"... there has to have been definiteness with respect to the present invention because it is a Continuation and because the Examiner could not have made the previous rejections under 35 U.S.C. 102 had the invention truly been without definiteness."**

14. The Examiner states,

*"d) claims rejected as being anticipated by Kinsella under 35 U.S.C. 102(b) are not correctly identified (e.g., see item 95, page 110)."*

**THE TRUTH** - With the exception of the Single Misprint the claims were correctly identified.

Appellant thanks the Examiner for this careful detail, and Appellant has corrected this.

Appellant suggests that the Examiner has said this "tongue-in-cheek" and to put the Appellant through another "hoop" because although the Applicant did make a misprint here and used "Claims 1, 2, 4, 5, 7, 10, 13, 15 and 16 have been rejected under 35 U.S.C. 102 (b) as being anticipated by Kinsella (U.S. 3,682, 806)" instead of "Claims 1, 2, 4, 5, 7, 10, 13, 15 and 16 and 21 have been rejected under 35 U.S.C. 102 (b) as being anticipated by Kinsella (U.S. 3,682, 806)". However, as the Examiner knows, in fact, in the important summary page on 141 of the Appeal Brief, the Appellant stated this correctly.

This demand of the Examiner is inconsistent with the U.S. Supreme Court, which has ruled that any *pro se* litigant is entitled to less stringent standards [U.S. Rep volume 404, pages 520-521 (72)].

15. The Examiner states,

*"g. Appendix A, which the applicant refers to as listing claims involved in the Appeal, is incorrect. For example, a) claim 19 does not include the qualifying term "active" before "quantity"."*

Appellant thanks the Examiner for this careful detail, and Appellant has corrected this misprint.

16. The Examiner states,

*"claims that have not been rejected, such as claims 11 and 20, are improperly included in the list."*

Appellant thanks the Examiner for this careful detail, and Appellant has corrected this misprint.

17. The Examiner states,

*"The purpose of Appendix B is unclear. Applicant should either properly relate this Appendix to his arguments or delete it."*

**THE TRUTH** - Appendix B Was Quoted In The Text In Two Place

Appellant thanks the Examiner for this careful detail, but the Appellant notes that Dr. Mallove's quotes from Appendix B were cited in context on pages 28 through 29 and 129 through 130 in the Appeal Brief. Perhaps the Examiner missed this, and therefore, the Appellant has corrected this for the Examiner.

**SUMMARY**

18. Appellant has fixed the errors which the Office has noted. Appellant thanks the Examiner for attention to detail and notes that the U.S. Supreme Court, which has ruled that any *pro se* litigant is entitled to less stringent standards [U.S. Rep volume 404, pages 520-521 (72)].

However, the Office's communication dated 12/30/03 (Exhibit "A"), appears to itself have eleven serious errors. These must now be examined in the light of, previously, thirty two (32) errors in other recent Office Communications used by the Examiner to delay both justice and delivery of Appeal Briefs to the Board [said communications dated 11/18/03, 12/18/03, and 12/4/03 (but mailed 12/18/03)].

First, this is inconsistent with the U.S. Supreme Court, which has ruled that any *pro se* litigant is entitled to less stringent standards [U.S. Rep volume 404, pages 520-521 (72)]. Second, considering only the eleven misguided demands here, if there was a fifty percent likelihood of each error (that is, if it were made innocently), then the forty three (43) cumulative errors by the Examiner in the last few months reveal that there is only a one in a 8.79 trillion likelihood [1 in  $\sim 8.79 \times 10^{12}$ ] that the Examiner is innocent regarding these errors.

The Appellant thanks the Examiner, Office for the careful attention given to the submitted Appeal Briefs and for pointing out the serious matters. All matters have been addressed.

Respectfully submitted,



Mitchell R. Swartz, ScD, MD, Appellant, pro se

**Certificate Of Mailing [37 CFR 1.8(a)]**

January 4, 2004


To Whom it Does Concern:

I hereby certify that this correspondence will be deposited with the United States Postal Service by First Class Mail, postage prepaid, in an envelope addressed to

"Office of the Clerk  
Board Of Patent Appeals  
c/o The Commissioner for Patents  
Alexandria, VA 22313-1450" on the date below.

Thank you.

Sincerely,  
January 4, 2004

  
M.R. Swartz



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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/750,765	12/28/2000	Mitchell R. Swartz		8044

7590 12/30/2003

Mitchell R. Swartz, ScD, EE, MD  
16 Pembroke Road  
Weston, MA 02493

EXAMINER

ART UNIT PAPER NUMBER

DATE MAILED: 12/30/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

EXHIBIT "A"

BEST AVAILABLE COPY

**Notification of Non-Compliance  
With 37 CFR 1.192(c)**

Application No.

09/750,765

Applicant(s)

SWARTZ, MITCHELL R.

Examiner

Rick Palabrica

Art Unit

3641

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address--**

The Appeal Brief filed on 28 October 2003 is defective for failure to comply with one or more provisions of 37 CFR 1.192(c). See MPEP § 1206.

To avoid dismissal of the appeal, applicant must file IN TRIPLICATE a complete new brief in compliance with 37 CFR 1.192(c) within the longest of any of the following three **TIME PERIODS**: (1) **ONE MONTH** or **THIRTY DAYS** from the mailing date of this Notification, whichever is longer; (2) **TWO MONTHS** from the date of the notice of appeal; or (3) within the period for reply to the action from which this appeal was taken. **EXTENSIONS OF THESE TIME PERIODS MAY BE GRANTED UNDER 37 CFR 1.136.**

1. ☐ The brief does not contain the items required under 37 CFR 1.192(c), or the items are not under the proper heading or in the proper order.
2. ☐ The brief does not contain a statement of the status of all claims, pending or cancelled, or does not identify the appealed claims (37 CFR 1.192(c)(3)).
3. ☐ At least one amendment has been filed subsequent to the final rejection, and the brief does not contain a statement of the status of each such amendment (37 CFR 1.192(c)(4)).
4. ☐ The brief does not contain a concise explanation of the claimed invention, referring to the specification by page and line number and to the drawing, if any, by reference characters (37 CFR 1.192(c)(5)).
5. ☐ The brief does not contain a concise statement of the issues presented for review (37 CFR 1.192(c)(6)).
6. ☐ A single ground of rejection has been applied to two or more claims in this application, and
  - (a) ☐ the brief omits the statement required by 37 CFR 1.192(c)(7) that one or more claims do not stand or fall together, yet presents arguments in support thereof in the argument section of the brief.
  - (b) ☐ the brief includes the statement required by 37 CFR 1.192(c)(7) that one or more claims do not stand or fall together, yet does not present arguments in support thereof in the argument section of the brief.
7. ☐ The brief does not present an argument under a separate heading for each issue on appeal (37 CFR 1.192(c)(8)).
8. ☒ The brief does not contain a correct copy of the appealed claims as an appendix thereto (37 CFR 1.192(c)(9)).
9. ☒ Other (including any explanation in support of the above items):

See Continuation Sheet

**MICHAEL J. CARONE  
SUPERVISORY PATENT EXAMINER**

Continuation of 9. Other (including any explanation in support of the above items):

- a. The statement of the Status of Claims is inconsistent with Appendix A (Claims Involved in the Appeal). Claims 11 and 20 are not listed in the Status Of Claims but they are listed in Appendix A.
- b. The statement of Status of Amendments is confusing because it appears to refer to the original claim 5, instead of an amended claim 5.
- c. The Summary of Invention is improper because it includes subject matter not found in the disclosure (e.g. see page 4, 2<sup>nd</sup> paragraph which is not recited in the Abstract).
- d. The recitation and scope of Issues is improper because it does not conform to MPEP 1206. For example, applicant does not specify the basis of the alleged unpatentability of the claims. An example of a proper way of phrasing an issue is as follows: "Whether claims 1-20 are unpatentable under 35 U.S.C. 112, first paragraph, based on a nonenabling disclosure." Each issue should correspond to a separate ground of rejection, and the statement of issues should not include any argument concerning the merit of the issues. Other examples of impropriety include: a) associating operability of the claimed invention with 35 U.S.C. 112, 1<sup>st</sup> and 2<sup>nd</sup> paragraphs issues; b) improperly including items not relevant to the grounds of rejection used by the examiner, e.g., 1.192c(6)(v), statements on "disingenuous claim by the Office," etc.
- e. The statement on Grouping of Claims is improper because it includes arguments as to why claims 1, 4 and 5 distinguish and limit the invention. These arguments should be in the Argument section.
- f. Applicant's contentions in the Arguments section are improper. Examples of impropriety include: a) issues of operability and utility are improperly associated in arguments regarding the 35 U.S.C. 112, 1<sup>st</sup> paragraph rejection (see page 22 of the Brief); b) arguments regarding 35 U.S.C. 112, 2<sup>nd</sup> paragraph, improperly discusses 35 U.S.C. 102(b) rejection of claims (e.g., see page 92); c) claims rejected under 35 U.S.C. 112, 2<sup>nd</sup> paragraph are not correctly identified (e.g., see item 75, page 92); d) claims rejected as being anticipated by Kinsella under 35 U.S.C. 102(b) are not correctly identified (e.g., see item 95, page 110). The Grouping of Claims section states that "the appealed claims do not stand or fall together." However, there is no discussion in the Arguments section as to why EACH claim is considered separately patentable.
- g. Appendix A, which the applicant refers to as listing claims involved in the Appeal, is incorrect. For example, a) claim 19 does not include the qualifying term "active" before "quantity"; b) claims that have not been rejected, such as claims 11 and 20, are improperly included in the list.
- h. The purpose of Appendix B is unclear. Applicant should either properly relate this Appendix to his arguments or delete it.

DETAILED ACTION

EXHIBIT "B"  
Page 1

1. Applicant's Amendment in Paper No. 13, dated 12/9/02, is acknowledged. This amendment revised claims 1, 3, 4, 6, 12, 13 and 19, added new claims 21-22, and traversed the rejection of previously examined claims. This amendment is in response to Office Action dated 11/22/02.
2. The Examiner stated in said Office Action that the current application does not qualify as a continuation of S/N 09/760,970 because of differences in subject matter covered. Applicant addressed this problem by deleting references to "fuel cells", replacing "hydrogen storage" with "hydrogen loading" and deleting "pressure" in the term "pressure-loaded" metals in the statement of relevance of the claimed invention. This change would still not qualify the current application as a continuation of S/N 09/760,970 because there are still significant differences in the subject matters of the two applications. The parent application refers to "electrochemical nuclear fusion in or about metals" that is different from the broader subject matter of "electrochemical reactions in or about metals" in the current application. Also, the parent case specifically highlights the relevance of the claimed invention to "cold nuclear fusion in pressure loaded metals" whereas the current case deletes the "cold" term and refers only to "nuclear fusion in loaded metals." Accordingly, the current application cannot claim priority to the 9/17/91 filing date of the S/N 09/760,970.

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Art Unit: 3641

to why the specification is objected to and the reasons set forth in section 11 above are accordingly incorporated herein.

EXHIBIT  
"B"  
PAGE 2

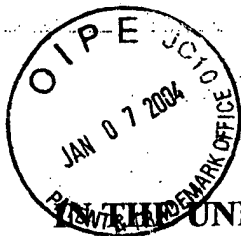
14. Claims 1-10, 12-19, 21 and 22 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The claims are vague, indefinite and incomplete.

The preambles of method claims 1-10 and 12, and apparatus claims 13-19 disclose a process and apparatus, respectively, for producing a product using a material which is loaded with an isotopic fuel. This implies that the process/apparatus is applied to a material that already contains isotopic fuel. However, the body of the claims disclose supplying and loading said isotopic fuel into the material. These claims are vague, indefinite and incomplete as to whether the process/apparatus supplies and loads additional isotopic fuel to the material that already contains isotopic fuel, i.e., do the claims imply multiple loading of fuel?

The preambles of method claims 1-10 and 12 are directed to a process for producing a product and for controlling the loading of isotopic fuel into a material, and the preambles of claims 13-19 are directed to an apparatus for producing a product, however, the bodies of the independent claims fail to recite a specific step of producing said product, as well as a specific step of controlling said product, and, the claims are hence vague, indefinite and incomplete. See also MPEP 2172.01.

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JAN 13 2004  
GROUP 3600

UNITED STATES PATENT AND TRADEMARK OFFICE

Inventor : Mitchell R. Swartz

Serial no. 09/ 750,765

Filed: 12/28/00

For: **METHOD AND APPARATUS  
TO CONTROL ISOTOPIC FUEL  
LOADED WITHIN A MATERIAL**

This is a continuation of Serial no. 07/ 760,970

Filed: 09/17/1991

Group Art Unit: 3641

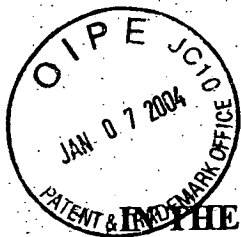
Examiner: Mr. Palabrica, R.J.

*Revised  
3/10/04*

January 4, 2004

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### **(1) Real Party In Interest**

The party named in the caption of the brief is the real party in interest:

Mitchell R. Swartz, ScD, MD, EE, Appellant, *pro se*

### **(2) Related Appeals And Interferences**

Appellant is not certain if Appellant's other cases presently or previously before the Board may or may not directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal. Appellant has complied with each previous directive of the Board.

The concept of loading of hydrogen in metals, in the heat generated, in the measurement of said loading, and in several of Appellant's inventions associated with that subject matter in the following.

Appeal No. 98-2593 regarding the specification and claims of application serial number 08-406,457

Appeal No. 97-3208 regarding the specification and claims of application serial number 07-339,976

Appeal No. 94-2921 regarding the specification and claims of application serial number 07-371,937

Appeal No. 94-2920 regarding the specification and claims of application serial number 07-760,970

Several Appeals have been just filed, and their numbers are not known.

### **(3) Status Of Claims**

Claims 1-10, 12-19, 21, and 22 remain in this application

Claims 1-10, 12-19, 21, and 22 (all claims) stand rejected pursuant to 35 U.S.C. 112, first paragraph.

Claims 1-10, 12-19, 21, and 22 stand rejected pursuant to 35 U.S.C. 112, second paragraph.

Claims 1-10, 12-19, 21 and 22 stand rejected pursuant to 35 U.S.C. 102(b).

Claims 1-10, 12-19, 21, and 22 stand rejected pursuant to 35 U.S.C. 101.

### **(4) Status Of Amendments**

The Office's Advisory allowed entry of amended Claim 5.

## **(5) Summary Of Invention**

As the Abstract of the original specification states,

**"The present invention ... uses a two-stage method which involves a first stage of electrode loading, and then, a second stage of sudden rapid ("catastrophic") flow of hydrogen within the metal. ... The apparatus includes means to extract products. The apparatus includes intraelectrode barriers to obstruct the movement of the isotopic fuel. The apparatus includes thermal and electrical busses, and enables integration of smaller units into larger assemblies. "**

On Page 4, the original specification (lines 9-10) continues to teach the utility of the subject matter,

**"Controlled reactions in loaded metals offer the possibility of more efficient and inexpensive energy."**

Page 6 of the original specification (lines 1-19) teaches the scope of the subject matter, defined by the rejected claims.

**"The foregoing objects are achieved in a system which includes in combination:**

- a novel two-stage loading device, containing in combination:**
- a cathode able to be charged from a novel anode with deuterons at a high efficiency,**
- a deuteron impermeable barrier to increase the rate of desired reactions,**
- a thermal pipe to remove heat,**
- a modified solution consisting of a gel containing lithium deuterioxide and palladium deuterioxide,**
- a structural barrier to minimize catastrophic loss of said cathode,**
- a composite character of said cathode to minimize catastrophic loss of said cathode,**
- a structural barrier external to said cathode to minimize catastrophic loss of said cathode, and**
- an external casing to provide uniformity and plug-in-ability of said device into,**
- a superassembly which allows integration of the smaller energy producing devices."**

Page 10 of the original specification (lines 3-20) teaches the details within the loaded sample, and what is the arrangement to produce that loaded sample.

"Figure 1 symbolically shows the compartments used to analyze an electrochemical reactor. Figure 1 gives organization to the different parts of a simple reactor referred to in this disclosure. It is not meant to be physically realistic with respect to size. The cathode is dissected into four regions. Three compartments are shown within the metal itself. The flow of deuterons is shown by arrows. The label 1 represents the metallic cathode, usually palladium in the preferred configuration. The labels 2 and 3 represents compartments 2, and 3 respectively, which are discussed in detail below. The label 7 represents the anode which in the preferred embodiment is composed of palladium. The label 6 represents the solution consisting in the preferred embodiment of a gel containing antidesiccant, in combination with LiOD, palladium salts, and heavy water ( $D_2O$ )."

On Page 10 of the original specification (lines 22-27 and continuing to page 11, lines 1-8), it is shown how to load.

"The application of said power source creates an applied electric field intensity which produces cation flow towards the cathode. There results in the near cathode solution (labeled as 5 in figure 1) a buildup of deuterons, and a low dielectric constant (gas bubble) layer. The bubbles are labeled as number 10 in figure 1. There may be spikes or on the cathode (labeled as 11 in figure 1)."

"Classically, an electrode in a deuteron solution at equilibrium should measure potentials associated with the Nernst equation. However, during the reaction, the system is not at equilibrium. Thermodynamics assumes equilibrium but tells nothing of the rate. Therefore, a quasi-1-dimensional model can be used to describe the situation external to the cathode. In the absence of solution convection, molecular flux ( $F$ ) results from both concentration gradients and electrophoretic drift."

Page 11 of the original specification (lines 13-29) teaches how the loading depends upon the solution.

"Coupled equations thus determine the distribution of deuteron species in the bulk solution.  $K_r$  is the bulk rate of the desired reactions.  $K_c$  is the rate at which deuterons physically enter the palladium cathode.  $B$  is the diffusivity."

"For simplicity, a number of approximations are made, such as no free charge density. In addition, deuteron penetration occurs at the cathode, and is electron limited, at an efficiency of  $E_c$ , so that the following steady state expression for the initial coefficient of the final spatial distribution of deuterons is:"

On Page 12 of the original specification (lines 1-9) teaches the subject matter involving different compartments within an electrode,

"Figure 2 a simplified two-dimensional diagram which schematically shows the cathodic compartments used to describe a CAM electrochemical reactor. The cathode is dissected into several regions. The label 1 again represents the crystalline metal cathode. In figure 2, the label 2 points out the entrapped volumes within compartment 1 (label 1). Three of the compartments are open to the ambient and two are labelled by number 3; they represent compartment 3. Most current theories involve the crystalline metal (label 1)."

On Page 13 of the original specification (lines 1-21), continues with the teaching of the role of vacancies and movements of deuterons after loading,

"The catastrophic active medium (CAM) theory differs from the other theories in that the desired reactions are hypothesized to not occur within the metal bulk, but at certain large vacancies and defects by the sudden fractional desaturation of deuterons. ... Figure 2 schematically shows a piece of such highly loaded metal. ... One cathodic compartment consists of the crystalline (e.g., beta phase) palladium into which deuterons can diffuse and remain in well-defined shallow energy traps. The second and third compartments of the cathode consist of the defects, grain boundary dislocations, and larger defects merging into bubbles and fissures. ... It is the movement of deuterons to compartment 2 which begins the process at that location."

On Page 13 of the original specification (lines 21-31), the text teaches the best mode contemplated by the inventor of carrying out his invention [underlined for emphasis],

"Catastrophic deuteron flux, coupled with a exothermic deuteron desaturation of the active medium, drives the fusion reactions. This occurs until, by a second catastrophic process, the fusion-defect-site is no longer confined. The final reactions in the CAM theory ends with the opening up of the defect or fissure through a large crack (compartment 3). By this theory the fissures are the result of the catastrophic desaturation of the active medium that was previously fully deuterated (e.g. in the preferred embodiment palladium or titanium)."

On Page 14 of the original specification (lines 9-16), teachings involving the materials to be loaded are given which enable any person skilled in the art to make and use the subject matter defined by each of the rejected claims,

"In most metals (e.g. aluminum, cobalt, copper, iron, nickel, platinum, silver, and tin) the deuterium solubility is described by the experimental relation [where K is the Sievert constant, and p is the partial pressure of deuterium gas ()]. However, all such metals have low solubility, and only dilute solutions are stable (about one deuterons per 10,000 or more metal atoms). Furthermore, in such metals deuteron solubility is endothermic. Therefore, the solubility for these metals increases with temperature."

On Page 14 of the original specification (lines 18-28), the teaching is given of the best mode contemplated by the inventor of carrying out his invention [underlined for emphasis],

"In contrast within palladium and titanium (and other Group IVb and Vb metals and some rare earths such as cerium, lanthanum, niobium, tantalum, thorium, vanadium, zirconium) much different behavior occurs. First, much more concentrated solutions can exist. For these metals the greater deutron concentrations mean that they act like emphores ('vases', similar to the biomaterial myoglobin). Furthermore, the deutron binding in these metals is exothermic. This indicates that the deuterons reside in shallow energy traps located within and throughout the lattice. Most importantly for the CAM theory, the deutron binding capacities decrease with temperature for these metals."

On Page 15 of the original specification (lines 1-12), teachings enable any person skilled in the art to calculate the important ratio of the subject matter defined by each of the rejected claims

"The deutron-laden metal lattices change significantly with increasing deutron loading. An extensive literature, involving solubility isotherms and x-ray results demonstrates two solid solutions of protons in palladium. During the time of deutron loading there is progressive increase in the volume of the cathode. A 5000 atmosphere internal pressure is consistent with the 4% plastic deformation following deuterium loading."

"Classically, the atomic ratio of deuterons to palladium is used to describe the quantity of deuterons in metal."  
(Pd D<sub>2</sub>), where "

On Page 16, the original specification (lines 1-5) teaches the subject matter of loading by deriving the fractional saturation ( $y_D$ ).

"The quantity of the latter depends both upon the amount of deutron binding material present [e.g. palladium in its beta phase], the number of intralattice sites available for the deuterons (n) and the affinity of the palladium lattice for those deuterons. The affinity is thus modeled as a fractional saturation ( $y_D$ )."

On Page 17, the original specification (lines 1-10) continues with the teaching of fractional saturation changes displacing deuterons.

"Figure 3 shows the hydrogen-solubility (hereinafter called saturation or binding) for palladium as a function of temperature, along with Taylor series expansions at two temperatures. The curve shows the quantity in cubic centimeters (STP) contained in 100 grams of palladium. The total quantity of hydrogen in palladium is markedly temperature dependent. The Taylor series expansion shows that the differential desaturation with temperature increases with decreasing temperature. The sharp decrease in total quantity bound for an increase in temperature may drive the desired reactions by catastrophically displacing deuterons into compartment 2."

On Page 17 of the original specification (lines 20-28) teachings enable any person skilled in the art to make and use the subject matter defined by each of the rejected claims

**"The CAM theory considers palladium as an "active" medium because unlike most other metals, palladium has a deuteron capacity which falls rapidly as the temperature rises. The temperature effect upon deuteron desaturation, in palladium, usually begins in the beta phase. The binding decreases so markedly with temperature that there is almost a decade decrease from just 0 to 50 Centigrade. At 110 C, the beta phase converts to the alpha phase with an additional 0.3 moles of  $O_2$  gas released."**

On Page 19 of the original specification (lines 1-18), teaches the best mode contemplated by the inventor of carrying out his invention

**"Figure 4 shows that as current is delivered to the cathode there is a steady increase in deuterium within the cathode. Initially, because of the large capacity for deuteron binding in compartment 1, the deuteron pressure rises only slightly. ... It can be seen that there occurs a critical catastrophic event wherein the fractional saturation suddenly falls as the temperature rises in concert. As the active medium (palladium) catastrophically releases deuterons to the defect sites astronomic pressures develop. In a crescendo fashion, the desired reactions result and the cathodic temperature rises even further. The temperature in compartment 2 rises further, but is limited as phonons carry off the excess energy of the reactions. The active medium around the defect site, in which the desired reactions occur, reabsorbs phonons resulting in the observed excess heat."**

On Page 19 of the original specification (lines 20-28) continues with the teaching of increasing the likelihood of the desired reactions by the catastrophic fractional desaturation of deuterons.

**"The catastrophe occurs precisely because the further temperature increase causes even more flux of deuterons into compartment 2, further increasing the likelihood of the desired reactions. The reaction is driven by the catastrophic fractional desaturation of deuterons from the crystalline palladium lattice, previously filled to capacity. The catastrophic mass transfer of deuterons to the defects (from the saturated metal, not the solution) enables the desired reactions to occur. Also the electrical charging of the cathode to a high negative voltage should enhance the reaction."**

On Page 19, the original specification (lines 30 and continuing to page 20, line 5) teaches the correlation to deuteron (or hydrogen) embrittlement.

**"The reactions of deuterium continue until the crystalline palladium (the active medium because of its high fractional saturation and its exothermic desaturation tendency) is spent of its deuterons or until, by a second catastrophic process, the fusion-defect-site is no longer confined. At that point, catastrophic exposure of compartment 2 to the ambient occurs creating compartment 3. The intracathodic compartment 3 of the CAM theory is known from endstage deuteron (or hydrogen) embrittlement."**

On Page 21, the original specification (lines 1-16) teaches the best mode contemplated by the inventor of carrying out his invention, including anode shape, solute in the heavy water solution, and the arrangement of the electrical power source.

"Turning now to Figure 5 shows a typical experimental setup, but with a novel cruciform-shaped sacrificial anode of palladium in a solution (labeled 7). The preferred solution (6) contains palladium salts, lithium deuterioxide, and heavy water. The cruciform shape is the preferred shape of the anode in that as it is sacrificed to the solution (enabling efficient codeposition of palladium and deuterons) the surface area most nearly remains constant during its decomposition of said sacrificial anode. The connections to the electrodes are labeled as 81 and 82. The reaction vessel is labeled 8. The cathode is labeled as number 1. ... However, the deuterated metals could also be filled by codeposition of deuterium and palladium, or by high pressure deuterium gas."

On Page 21 of the original specification (lines 18-19), the present invention is shown to be useful, because it removes heat and assembles smaller devices.

"In the following devices, heat pipes are included as well as a superassembly capable of removing excess heat."

Page 21 of the original specification (lines 21-24) teaches the material required for loading.

"In the following devices, palladium is the described preferred embodiment for the cathodes, but members of the group consisting of vanadium tantalum, niobium, lanthanum and cerium may also be used."

On Page 22 of the original specification (lines 1-17) teaches the best mode contemplated by the inventor of carrying out his invention to minimize electrode damage.

"Furthermore, one improvement is that the cathode should be improved for deuteron solubility, while being stabilized from catastrophic deformation which would end the desired reactions. There are a number of methods by which this is accomplished."

"Within the metal (labeled 1), there are several methods used in this device to minimizing catastrophic fracture. First, is the preferred use of cathodic binary alloys. Some palladium alloys (e.g. boron, silver or gold) exhibit, for intermediate compositions, peak levels of hydrogen (and deuteron) solubility."

"Second, in the preferred embodiment manganese could be added to the palladium to decrease the susceptibility to deuteron cracking. Third, in the preferred embodiment said cathode is stabilized by an external barrier construction. Fourth in the preferred embodiment additional diffusion barriers are placed to obstruct the released deuterons."

On Page 22 of the original specification (lines 19-27) teachings enable any person skilled in the art to make and use the subject matter defined by each of the invention with regard to minimizing electrode deformation.

**"In the preferred embodiment internal materials are added to decrease the likelihood of electrode deformation. For example a composite material could be fashioned using palladium and epoxy so that the electrode is more like bubblegum than like crystalline metal. Although the inter- and intramolecular forces are less, the bond energies increase because the important parameter is the product of force times distance. The weaker interactions, acting over longer distances, would lead to increased energies required to rupture the electrode."**

Page 23 of the original specification (lines 1-7) enables any person skilled in the art to make and use the composite material taught in the application.

**"In the preferred embodiment tungsten microspheres are added to the metal. The very large melting temperature of the tungsten prevents it from melting and alloying with the palladium when the desired reactions are achieved. The purpose of the spherical shape of the microspheres is to stop the propagation of defects by giving a large radius of curvature which thus decreases the likelihood of said defects proceeding."**

On Page 23 of the original specification (lines 22-28), the barriers to prevent expansion are taught.

**"After turning to figure 6, attention is drawn to the barrier labeled 40 which surrounds one sphere of compartment 2 (which is not labeled). It is made of a material characterized by a high modulus of elasticity so as to retard any expansion of compartment 2. The purpose of the expansion barrier is to prevent expansion of the cathode (labeled 1) and thereby minimize formation, and propagation of compartments 3."**

Page 24 of the original specification (lines 1-18) teaches the best mode contemplated by the inventor of carrying out his invention, including the arrangement of electrodes, the direction of the applied electric field, and the locations of the barriers and other features.

"Figure 7 is an isometric drawing of a CAM electrochemical device, and shows the direction of the electric field. Figure 7 shows a see-through view over the cathodic volume. This cutaway exposes the four concentric components of the device at that location. In this simplified CAM device, surrounding the cathode, in coaxial fashion, are a deuteron diffusion barrier (labeled 50) and an expansion barrier (labeled 40). These barriers are discussed in detail below. In this particular device, the cathode is axially-fed the deuterons. ... The electric field points from anode (labeled as 7) to the cathode (labeled as 1). In the device shown in figure 3, label 20 represents the structural casing wall which makes this CAM device "dry". The enclosed solution, in the preferred embodiment actually consisting of a heavy water-LiOD-gel, and is labeled number 6. The device is shaped like a fuse and can be easily placed into, or removed from, an assembly and system used to both power the reaction and extract the excess heat."

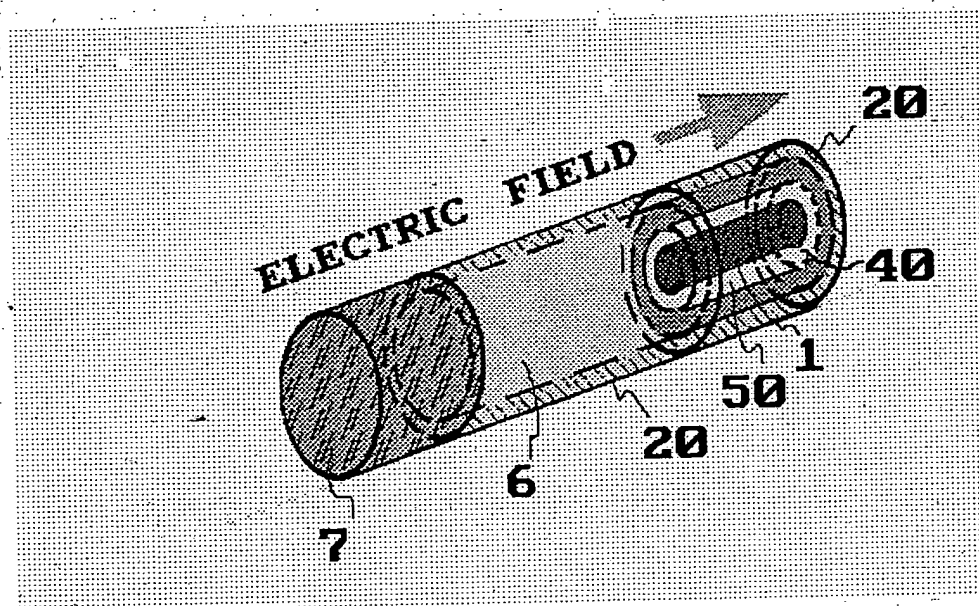


Figure 7

On Page 24 of the original specification (lines 22-32, and continuing to page 25, lines 1 through 6), Figure 8 and the text teach for those skilled in the art the organization of the components of the present invention.

"Figure 8 shows a vertical cross-sectional slice of a CAM device, having a external structural casing support system, a centrally placed axially-filled cathode, a coaxial deuteron-barrier and coaxial expansion-barrier. The structural support system (labeled 20) encloses an axially-filled cathode for loading reactions consisting of a coaxial deuteron-barrier and coaxial expansion-barrier. The expansion barrier (labeled 40) surrounds the cathode and prevents expansion. Between the two is a deuteron impermeable barrier (labeled 50) which prevents outward diffusion of deuterons when the cathode is catastrophically desaturated of its deuterons. The barrier prevents loss of deuterons to the expansion barrier, and acts as a circumferential locus of fusion. The cathode is labeled as 1. In this CAM device, the cathode is charged in a direction perpendicular to the drawing (e.g. similar to figure 7)."

Page 25 of the original specification (lines 8-12), teaches the best mode contemplated by the inventor of carrying out his invention with respect to the thermomechanical material, such as a thermally-conductive epoxy.

"Figure 9 is a cluster of seven CAM devices held together by an external structural casing support system, and an intercluster thermomechanical material. A high thermally conductive epoxy would be the preferred embodiment. This would enable facile, relatively inexpensive, support and thermal coupling for the system."

Page 25 of the original specification (lines 14-22) teaches the any person what the organization of the electrodes, barriers, and deuteron flow is as the "catastrophic desaturation" creates the internal flux after loading.

"The cathodes are fashioned as cylindrical palladium surrounded by a deuteron impermeable (or relatively impermeable) barrier (e.g. tungsten or gold). The result would be that after a slow charge with deuterons, the catastrophic desaturation yields a rapid symmetric flux through the walls of the cathode cylinders - directly into the impermeable wall thereby increasing fusion."

On Page 25, with reference to Figure 10, of the original specification (lines 24-30, and continuing to page 26, lines 1 through 8) teaches the best mode contemplated by the inventor of carrying out his invention using a central axially-filled cathode, two coaxial deuteron-barriers and an inner thermal pipe. Included are the compositions of the materials to be used.

"Figure 10 shows a vertical cross-sectional slice of a CAM device, with a central axially-filled cathode, two coaxial deuteron-barriers and an inner thermal pipe. This device is surrounded by a structural support system labeled 20. The axially-filled cathode (labeled 1) is constructed within and around novel devices. Coaxial with the cathode are two sites consisting of double coaxial deuteron-barriers and an inner thermal pipe."

"The inner thermal barrier is labeled 70. In the preferred embodiment this would be gold. Within that barrier is the thermal pipe (labeled 70). In the preferred embodiment, the pipe could consist of a thermocouple, or be connected to a thermocouple by a diamond filament or thermally conductive composite material. The outer deuteron barrier is labeled 50. The barrier to expansion is labeled 20. For this device the inner four layers (from inner to outer) are diamond filament, gold, palladium, and gold."

On Page 26 of the original specification (lines 10-31, and continuing to page 27, lines 1-2), with reference to Figure 11, the inventor teaches the subject matter in a different embodiment, and again includes the materials involved, as well as the configuration.

"Figure 11 shows a vertical cross-sectional slice through a novel CAM coaxial device with a coaxially-filled cathode, and an inner coaxial deuteron-barrier and thermal pipe. This embodiment is in a cylindrical configuration. The electric fields are in the radial direction. This device is characterized by coaxial loading of the cathode with deuterons (labeled 1). In the figure, the anode is circumferential to the cathode, and is labeled as 7. The solution (labeled 6) consists of lithium deuterioxide, palladium deuterioxide, and heavy water as the preferred embodiment. The inner diffusion barrier (labeled 60, and consisting of gold in the preferred embodiment) and the inner thermal pipe (labeled 70, and consisting of a diamond filament in the preferred embodiment) are shown in cross-section. ... The heat energy is extracted from the center. In this CAM device, the activation current is supplied between 1 and 7. The barrier (70) acts to provide a geometric focus at which the desired reactions occur. The is extracted through thermal pipe (70) which in the preferred embodiment is diamond, or composites of diamond (e.g. thermally conductive epoxy filled with diamonds)."

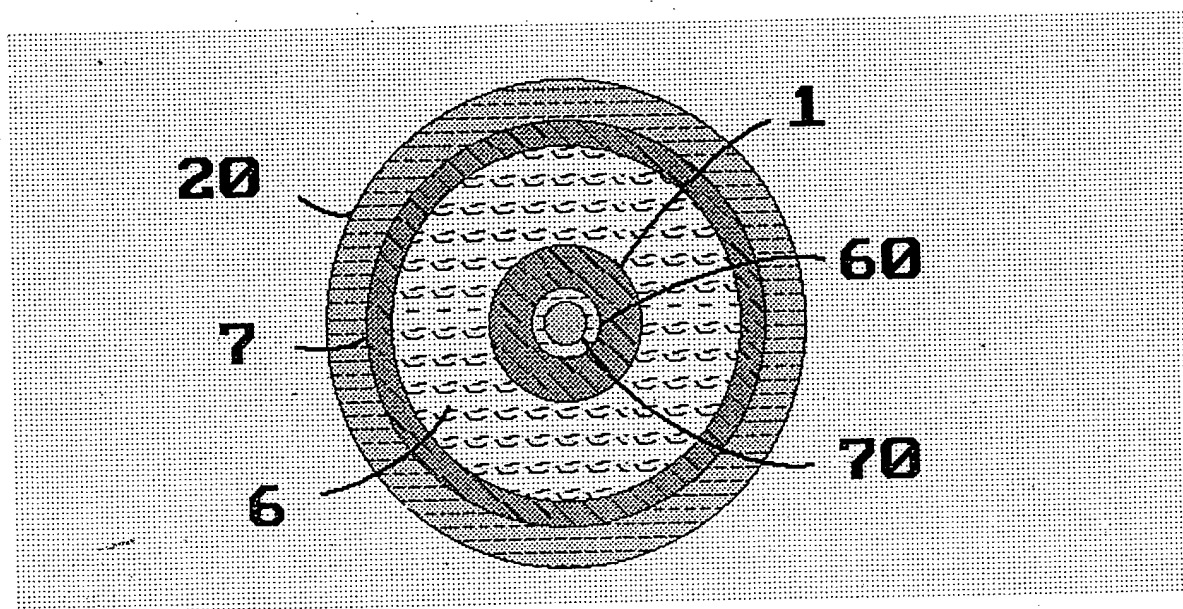


Figure 11

Page 27 of the original specification (lines 4-11) teaches the best mode contemplated by the inventor of carrying out his invention with respect to device assembly.

"Figure 12 shows three CAM devices (labeled as 90 in figure 12; but similar to what is shown in figure 3). These devices each contain a cathode (labeled 1), intradevice gel containing lithium and palladium deuterioxide (labeled 6), and anode (labeled 7). These CAM devices are inserted, similar to a fuse onto a holding board (labeled 91), held in place by clips (labeled 92). Some of the clips are electrically conductive (e.g. to hold the anode) whereas other clips are insulators."

On Page 27 of the original specification (lines 13-18) is taught how the devices are inserted.

"After being mounted to the board, the three CAM devices are inserted into the device receptor apparatus (labeled 93 in figure 12). Said apparatus has electrical and thermal connectors (labeled 96, and 97 respectively) which are held in a mechanical connecting system (labeled 94). The entire apparatus has heat dissipative radiator (labeled 95)."

On Page 27 of the original specification (lines 20-25), the present invention is shown to be useful, because each "unit is thus easily exchangeable by replacement with a functioning one".

"The purpose of the device receptor apparatus is to integrate the three (or more) CAM units. The three cathodic connectors are connected to the control apparatus. However, the thermal connections (labeled 97) are used to couple said units together. The damage or rundown of one CAM unit is thus easily exchangeable by replacement with a functioning one."

Page 27 of the original specification (lines 27-32, and continuing to page 28, lines 1 through 10) teaches the best mode contemplated by the inventor of carrying out his invention using orthogonal electrical fields. The specification includes discussions of the casings, applied electric fields, and barriers.

"Figure 13 is a crosssectional drawing of a lamellar CAM reactor. This device has two orthogonal applied electric fields. The first (labeled E-field number 1 in the figure) is that which is applied to charge the palladium with deuterons. The second applied electric field intensity is delivered after full charging has been achieved. In the figure the anode and cathode are labeled as 7 and 1. The electrolyte solution or gel is labeled as 6. The connections for the first electric field are labeled as 81 and 82. The connections for the second electric field are labeled as 85 and 86. The mechanical casing is labeled 20. The deuteron impermeable barrier is comb-shaped in this preferred configuration, and is labeled 55 in figure 13. The cathode in this preferred configuration is divided into parallel slabs. Between these slabs alternate deuteron-impermeable barriers. Application of the second electric field causes the deuterons already loaded in the cathode to redistribute, but the deuteron-impermeable barrier(s) act to enhance the desired reactions."

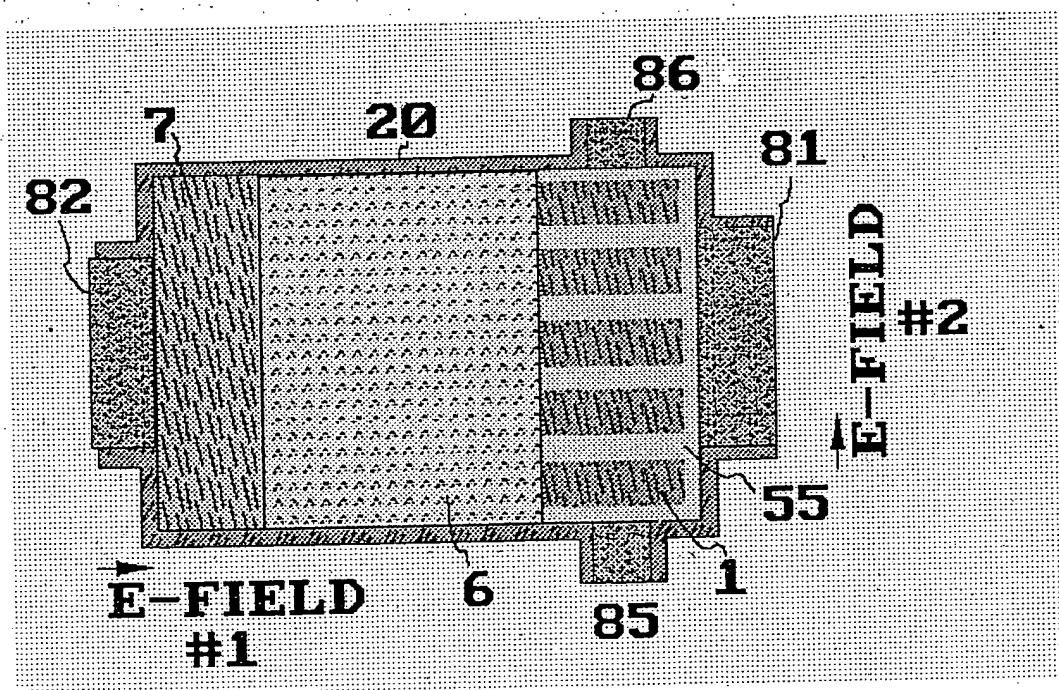


Figure 13

Page 28 of the original specification (lines 16-32, and continuing to page 29, lines 1 through 3) teaches the best mode contemplated by the inventor of carrying out his invention using the combination of orthogonal electric fields and device assemblies, with the applicant list connections and materials.

"Turning to figure 14 which shows three lamellar CAM reactors. Each device is equipped with orthogonal applied electric fields. The second applied electric field intensity is delivered after full charging. "

"Each reactor is labeled as 90 in figure 14, but similar to what is shown in figure 13. These devices each contain a cathodes (labeled 1), intradevice gel containing lithium and palladium deuterioxide (labeled 6), and anode (labeled 7). These CAM devices are inserted, similar to a fuse onto a holding board (not shown), held in place by clips (labeled 102). The three CAM device are shown connected to a microprocessor control system (labeled 110). Said apparatus has an electrical bus to connect the anodes (labeled 105) which are connected to the anodic connectors (labeled 82). Said apparatus has an electrical bus to connect the cathodes (labeled 106 and 107) which are connected to the cathodic connectors (not labeled in the figure). The cathodic system buses (106 and 107) are electrically shorted together during the deuterium charging."

"Said apparatus has a thermal bus (labeled 107) connected to the heat pipes (labeled 70) which are held in a mechanical connecting system (labeled 20)."

On Page 29 of the original specification (lines 6-16), teaches the connections and setup so that any person can make and use the subject matter defined by each of the rejected claims.

"The purpose of the receptor apparatus is first to integrate the three (or more) CAM units. The three cathodic connectors are connected to the control apparatus. However, after loading the cathodes, the cathodic buses (106 and 107) are separated and a second electric potential is supplied between these two buses. The result is the second applied electric field which is shown in figure 13, but not in figure 14. The result is the piling up of deuterium at the deutron-impermeable barriers (labeled 55 in figure 14). The energy is directed out via the heat pipes (70) and the thermal bus (107). The damage or rundown of one CAM unit is thus easily exchanged by replacement with a functional one."

Page 29 of the original specification (lines 18-27) teaches the stereoconstellation of the invention, its composition, and barriers.

"Figure 15 is a crosssectional drawing of a device used to activate a CAM reactor. The cathode is labeled 1. The solution or gel is labeled as 6. The mechanical casing is labeled 20. The deutron impermeable barrier is labeled 55. ... The CAM device shown in figure 15 does not show, for simplicity, the thermal transfer equipment. External structures labeled 110 and 120 are near circumferential in location to the casing (20), and are used to squeeze the CAM reactor. The resultant pressure causes catastrophic desaturation."

On Page 30 of the original specification (lines 1-14) there are teachings which enable any person skilled in the art to make and use the subject matter defined by each of the rejected claims, including electrodes, heat pipes, subassemblies, electrical busses, barriers and clips.

"Turning to figure 16, shown are three pressure-activated CAM reactors. Each reactor (un-labelled) is similar to that shown in figure 13. These devices each contain a cathode (labeled 1), heat pipes (labeled 70), expansion barrier (40), deuteron diffusion barrier (labeled 50), external casing (20), and thermomechanical connector (labeled 130) for assembling the heat pipes (70) to the external thermal bus (140). ... The CAM devices are inserted, similar to a fuse onto a holding board (150, 151 above and below the assembly), held in place by clips... External structures labeled 110 and 120 are near-circumferential in location to the casing (20), and are used to squeeze the CAM reactor."

Page 30 of the original specification (lines 16-20) teaches the subject matter of assemblies, quite useful to those skilled in the art and consumers, as well.

"The resultant pressure causes catastrophic desaturation. The purpose of the receptor apparatus is to integrate the three (or more) CAM units, and to couple said devices to the control system. As before, damage or rundown of one CAM unit allows easy replacement by a functioning one."

On Page 30 of the original specification (lines 22-32), there is teaching, quite useful to those skilled in the art, because it teaches the best mode contemplated by the inventor of carrying out his invention.

"Figure 17 is another configuration of device which can be easily integrated into power and heat systems. It consists of a reactor as described above (cf. figure 13) which is arranged as a thick film device, located in a transistor-like header. The header (labeled as 200) is perforated by six (6) holes (not labeled) to accommodate insulators (labeled 210), through which six leads enter said header. The leads consist of electric leads (182, 185, 181, and 186), and two thermal connections (labeled 170 in figure 17). The electrical leads are connected to the thick film device. The anode (labeled 7) is connected to the anodic terminal (82) to which is bonded the "anodic" lead (labeled 182)."

Page 31 of the original specification (lines 1-8) teaches any person skilled in the art to make and use the subject matter defined by each of the rejected claims, including use of semisolid gels and use of barriers to obstruct the driven deuterons.

"The cathode (unlabelled but located adjacent to its cathodic terminal labeled 81) is connected via the cathodic terminal (81) to the "cathodic" lead (181). The electrolyte is an electrolyte gel as discussed above (labeled 6). After loading the leads 185 and 186 are activated to drive the deuterons into the obstructing barriers (which alternate with the cathode)."

On Page 31 of the original specification (lines 10-18), teaches the best mode contemplated by the inventor of carrying out his invention with respect to extraction of generated product using an applied inhomogeneous magnetic field intensity.

"Figure 18 shows a CAM reactor with a modification to extract an isotopic nuclear fusion product (e.g. tritium) from said reactor rather than heat. The device shown in the figure has an axially loaded cathode (labeled 1). The anode is labeled 7, and the solution 6. The structural casing is labeled 20. The cathode and anode have electrical connections labeled 81, and 82, respectively."

"The electrical connections to the FUSOR power supply are labeled 181 and 182. An expansion barrier (40) is shown."

Page 31 of the original specification (lines 20-24) teaches the best mode contemplated by the inventor of carrying out his invention by using an inhomogeneous magnetic field intensity.

"An inhomogeneous magnetic field intensity is applied by coil labeled 300 to one portion of the cathode (1). Said magnetic field is driven by the power supply (labeled 301) in the figure. The spatially inhomogeneous magnetic field could also be created by a superconductor."

Page 31 of the original specification (lines 26-32, and continuing to page 32, lines 1 through 6) teaches loading, and the role of differential magnetic susceptibility.

"The cathode is loaded by the electrochemical drive system. The differential magnetic susceptibility between isotopic fuel and the nuclear fusion product is used to magnetically pump the product to and through the barrier labeled 350. At that location there is a buildup of the isotope with the larger magnetic susceptibility due to said differential magnetic susceptibility. The magnetic force resulting from the applied magnetic field is the derivative of the magnetic coenergy with respect to distance in the axial direction, and is proportional to the square of the current, the square of the number of turns in the coil (300), and said differential magnetic susceptibility. The products are removed at the product barrier (labeled 350). If said isotopic product is of lower magnetic susceptibility, then the coil is moved toward the portion of the cathode near to the solution (6)."

On Page 32 of the original specification (lines 8-10) teaches the subject matter.

"A two-stage method which involves a first stage of loading, and then, a second stage of sudden rapid ("catastrophic") flow of hydrogen within the metal."

An apparatus including a novel cathode; novel anode, and heat pipes, to improve reaction rates. An apparatus including means to extract products. An apparatus including intraelectrode barriers to obstruct the movement isotopic fuel."

## ISSUES

### 35 U.S.C. 112 (first paragraph)

Whether Claims 1-10, 12-19, 21, and 22 are unpatentable under U.S.C. §112 because there is not an enabling disclosure.

### 35 U.S.C. 112 (second paragraph)

Whether Claims 1-10, 12-19, 21, and 22 are unpatentable under U.S.C. §112 (second paragraph) because the claims are indefinite.

### 35 U.S.C. 102

Whether the subject matter sought to be patented as defined by 1-10, 12-19, 21 and 22 is unpatentable under U.S.C. §102 because of Westfall (US 5,215,631).

Whether the subject matter sought to be patented as defined by 1, 2, 4, 5, 7, 10, 13, 15, 16 and 21 is unpatentable under U.S.C. §102 because of Kinsella et al. (US 3,682,806).

Whether the subject matter sought to be patented as defined by 1-8 and 13-16 is unpatentable under U.S.C. §102 because of Patterson (US 5,318,675) or Patterson (US 5,372,688),

### 35 U.S.C. 101

Whether Claims 1-10, 12-19, 21, and 22 are patentable under U.S.C. §101 because the claimed invention is not operative and therefore has no utility.

### (7) Grouping Of Claims

Claim 1 distinguishes and limits the invention, in a process for producing a product using a material which is electrochemically loaded with an isotopic fuel, to a method of controlling the loading which includes in combination, loading said isotopic fuel into said material, then providing means for producing a change in the quantity of said isotopic fuel within said material, creating thereby a catastrophic diffusion flux of said isotopic fuel within said material, providing a diffusion barrier to said diffusion flux of said isotopic fuel within said material, and thereby producing said product.

Claim 4 distinguishes and limits the invention, in a process using an isotopic fuel loaded into a material, to a two-stage method for controlling the loading which includes in combination loading said isotopic fuel into said material, then providing means for producing a change in the quantity of said isotopic fuel within said material, creating thereby a catastrophic diffusion flux of said isotopic fuel within said material.

Claim 13 distinguishes and further limits the invention to an apparatus to produce a product using a material loaded with an isotopic fuel, which includes in combination means to load said isotopic fuel into said material, means to produce a change in the quantity of said isotopic fuel within said material, means to produce a catastrophic diffusion flux of said isotopic fuel within said material, means thereby to produce said product.

The appealed claims do not stand or fall together. The Arguments for such include the following.

## ARGUMENTS - 35 USC §112 first paragraph REJECTION

1. For each rejection under 35 U.S.C. 112, first paragraph, the Appellant below does fully and completely specify the many errors in the rejection, including how Appellant (then Applicant) timely provided evidence surmounting the Examiner's incorrect arguments and cited law surmounting the Examiner's arguments that are without legal foundation and not the normal standards of review. The Appellant's arguments can be divided into three groups. First, those errors of the Office that involve the invention itself. Second, there are those errors which involve the art to which the Office does refer. Third, the Appellant will discuss the standards of review from which the Office's behavior does deviate.

2. Claims 1-10, 12-19, 21, and 22 have been rejected under 35 U.S.C. 112 by the Examiner, based upon the Examiner's incorrect opinion that the "environment" in which the above-entitled invention operates "does not exist", based upon flawed reference to other old art ("FP" or "F+P") and by systematically ignoring Appellant's (then Applicant's) submitted Declarations of fact and accompanying Exhibits proving the Office wrong or disingenuous.

3. The appealed claims do not stand or fall together. Claims 1, 4, and 13 are separately patentable and do not stand or fall together because they are materially distinct with respect to 35 USC 112 first paragraph. Claims 1, 4, and 13 are separately patentable because they are not unduly multiplied, have separate limitations, and are required because the invention described by the original specification of the above-entitled application is very complex. Claim 1 distinguishes and limits the invention, in a process for producing a product using a material which is electrochemically loaded with an isotopic fuel, to a method of controlling the loading which includes in combination, loading said isotopic fuel into said material, then providing means for producing a change in the quantity of said isotopic fuel within said material, creating thereby a catastrophic diffusion flux of said isotopic fuel within said material, providing a diffusion barrier to said diffusion flux of said isotopic fuel within said material, and thereby producing said product. Claim 4 distinguishes and limits the invention, in a process using an isotopic fuel loaded into a material, to a two-stage method for controlling the loading which includes in combination loading said isotopic fuel into said material, then providing means for producing a change in the quantity of said isotopic fuel within said material, creating thereby a catastrophic diffusion flux of said isotopic fuel within said material. Claim 13 distinguishes and further limits the invention to an apparatus to produce a product using a material loaded with an isotopic fuel, which includes in combination means to load said isotopic fuel into said material, means to produce a change in the quantity of said

isotopic fuel within said material, means to produce a catastrophic diffusion flux of said isotopic fuel within said material, means thereby to produce said product.

4. The Appellant submits that the first paragraph of 35 U.S.C. 112 is complied with fully and completely, for reasons discussed in detail below.

The present invention has operability, is taught in the original specification, and is claimed by the claims.

The original specification described the subject matter defined by each of the rejected claims, and enables any person skilled in the art to make and use the subject matter defined by each of the rejected claims, and sets forth the best mode contemplated by the inventor of carrying out his invention.

The present invention's enablement is borne out by *de jure* by peer-reviewed publications.

The present invention's enablement is borne out by the *de facto* Declarations affirming to said operability and utility (which together manifest enablement).

**POINT 1: The Examiner's Communication Does Not Discuss The Invention As It Was Actually Taught, But Is Cut Of A Cloth Other Than This Invention**

5. With the exception of a single net post, the Examiner's references do not apply to the present invention, but rather are criticism of other work in the field, "FP" (for Drs. Fleischmann and Pons), or involve experiments which were not done using the techniques taught in the original specification and claims of the above-entitled application (thereby actually indirectly proving the utility of the present Application). The Examiner deviates from the present invention, and upon his systematic improper reference to other art ("FP" or "F+P") which he purports did not exist or was flawed, again makes a false segue to attempt to invalidate the Applicant's independent work over more than fourteen years which has been described in more than forty papers in peer-reviewed scientific journals.

The law states that enablement must be judged on this original specification and claims. The present invention is not the work of Pons and Fleischmann or their subject matter. The Examiner's continual referral to other much less relevant art is not really a rebuttal of this invention, but is a prejudicial attack against the Applicant, in disguise despite the Examiner's handwaving otherwise.

**CONCLUSION: If the Examiner must rely upon reference to art cut of a cloth other than this specification and claims, then his position must indeed be quite weak.**

**POINT 2: The Absence of Evidence is Not Evidence of Absence**

6. Several of the Office's references cited by the Examiner involve so-called purported "negative" results in that no large numbers of neutrons were observed. However, neutron emission is not expected in large amounts with these reactions (*vide infra*). Because the actual generation of neutrons is so unlikely, the absence of neutrons can not be inferred to indicate the absence of any other reaction or reactions. The absence of neutrons is not the evidence of the absence of fusion of isotopic fuels in a material.

Furthermore, not all of the art cited by the Examiner is "negative" with respect to neutrons as the Office purports. Actual "positive" evidence noted by the Examiner includes Rehn, Shani (who did monitor stimulated neutron radiation from deuterated materials after said deuterated materials were neutron-irradiated), and Faller (who did report a tritium increase). Thus, the Office's art, Rehn, Will, Shani, Faller, and others, cited by the Office, support the existence of the field.

**POINT 3: The Examiners "Evidence" Has Already Been Proven Flawed [but Ignored By the Examiner]**

7. The art supplied by the Office is outdated, not peer-reviewed, not relevant, and flawed. Such yellowed, brittle newspapers, and "ancient" reports have poor quality and cannot disprove the evidence the Applicant has presented regarding operability or utility. Several of the Examiner's references are flawed for reasons previously submitted by the Applicant, as discussed by the Applicant in the previous communication. Said so-called "negative" experiment papers from 1990-1991 contain serious errors and their errors are echoed thereafter in the Office's cited art (Huizenga, Taubes, and Jones). Simply put, these experiments were not done well and were contested in the peer-reviewed literature. Lewis, Miskelly, and Hilts have been and remain contested by scientists in published peer-reviewed literature (Miles 94B, Noninski 91, Noninski 93) and other art (Mallove 91, Milton 96). Most of the periodicals and newspapers cited by the examiner involve merely quoting the so-called "negative results" of others, either Alibagli (eg. Hilts) or Lewis et alia (Hilts, Browne), even though they remain validly contested and, therefore, they must be weighed accordingly. Furthermore, the Applicant's inventions surmount the problems so criticized therein, and these issues have been discussed in the applicant's peer-reviewed published papers, and in the Applicant's other patent applications [*vide infra*]. Applicant has already addressed the errors of Huizenga, Jones, Morrison, Miller, etc. previously with solid substantive response, including in Federal Court [A316-317, A321].

**POINT 4: Applicant's Peer-Reviewed Publications Prove Enablement**

8 Appellant's teachings on how to load these materials (confer claim. 1) is consistent with conventional physics and taught in the original specification and claims, has since been published in peer-reviewed journals and other art [M. Swartz, 1992, "Quasi-One-Dimensional Model of Electrochemical Loading of Isotopic Fuel into a Metal", *Fusion Technology*, 22, 2, 296-300; Swartz, M., 1994, "Isotopic Fuel Loading Coupled To Reactions At An Electrode", *Fusion Technology*, 96, 4T, 74-77; "Codeposition Of Palladium And Deuterium", *Fusion Technology*, 32, 126-130 (1997); Swartz, 1994, "Generalized Isotopic Fuel Loading Equations", and "Cold Fusion Source Book", International Symposium On Cold Fusion And Advanced Energy Systems", Ed. H. Fox, Minsk, Belarus; Swartz, 1997]. There is confirmation of Appellant's teachings, confirming operability as taught years earlier in the original specification and claims.

Appellant's teachings on the internal diffusion flux and interstitial barriers within the electrode (confer claim 1) has since been published in peer-reviewed journals and other art [cf; A100-A106, Hagelstein, Swartz, Optics and Quantum Electronics, *MIT RLE Progress Report*, 139: 1, 1-13 (1997); Swartz, 1997, "Phusons in Nuclear Reactions in Solids", *Fusion Technology*, 31, 228-236 (1997); Swartz, 1994, "Catastrophic Active Medium Hypothesis of Cold Fusion", 4, "Proceedings: Fourth International Conference on Cold Fusion" sponsored by EPRI and the Office of Naval Research; Swartz, 1997, "Hydrogen Redistribution By Catastrophic Desorption In Select Transition Metals", *Journal of New Energy*, 1, 4, 26-33]. There is confirmation of Appellant's teachings of internal diffusion isotopic fuel and interstitial barriers. These teachings confirm operability as taught years earlier in the original specification and claims.

Appellant's teachings on the desired reactions (confer claim 1) have also been published in peer-reviewed journals [Swartz, M., "Generality of Optimal Operating Point Behavior in Low Energy Nuclear Systems", *Journal of New Energy*, 4, 2, 218-228 (1999); Swartz, *et alia*, "Importance of Non-dimensional Numbers and Optimal Operating Points in Cold Fusion", *Journal of New Energy*, 4, 2, 215-217 (1999); Swartz, 1997, "Consistency of the Biphasic Nature of Excess Enthalpy in Solid State Anomalous Phenomena with the Quasi-1-Dimensional Model of Isotope Loading into a Material", *Fusion Technology*, 31, 63-74; Swartz, 1998, "Optimal Operating Point Characteristics of Nickel Light Water Experiments", "Proceedings of ICCF-7"; "Codeposition Of Palladium And Deuterium", *ibid*; Swartz, 1998, Improved Electrolytic Reactor Performance Using p-Notch System Operation and Gold Anodes, *Transactions of the American Nuclear Association*, Nashville, Tenn 1998 Meeting, (ISSN:0003-018X publisher LaGrange, Ill) 78, 84-85; Swartz, 1997, "Biphasic Behavior in Thermal Electrolytic Generators Using Nickel Cathodes", *IECEC 1997 Proceedings*, #97009; Swartz, 1998].

Although not explicitly in the claims, Appellant's teachings on standards and quality control ("Q/C") are relevant to experimental operability ["Patterns of Failure in Cold Fusion Experiments, Proceedings of the 33RD Intersociety Engineering Conference on Energy Conversion, IECEC-98-I229, Colorado Springs, CO, 1998; Swartz, M, 1997, "Noise Measurement in cold fusion systems, *Journal of New Energy*, 2, 2, 56-61; Swartz, 1996, "A Method To Improve Algorithms Used To Detect Steady State Excess Enthalpy", *Transactions of Fusion Technology*, 26, 156-159; Swartz, 1993, "Some Lessons from Optical Examination of the PFC Phase-II Calorimetric Curves", 2, Proceedings: "Fourth International Conference on Cold Fusion", 19-1, *op. cit.*;

Swartz, 1996, "Relative Impact of Thermal Stratification of the Air Surrounding a Calorimeter", *Journal of New Energy*, 2, 219-221 (1996); Swartz, 1996, "Improved Calculations Involving Energy Release Using a Buoyancy Transport Correction", *Journal of New Energy*, 1, 3, 219-221; Swartz, 1996, "Potential for Positional Variation in Flow Calorimetric Systems", *Journal of New Energy*, 1, 126-130; Swartz, 1997; Swartz, 1996, "Definitions Of Power Amplification Factor", *J New Energy*, 2, 54-59, and Swartz, 1997, "Explanations for Some Differences Between Reports of Excess Heat in Solid State Fusion Experiments", *J New Energy*, 2, 1, 60-65]. Such standards are necessary to control these reactions (confer claim 1). These publications confirm operability as taught years earlier in the original specification and claims.

9. The Examiner has not been fair.

Where are the Examiner's substantive responses to the several other publications which the Applicant has published in Fusion Technology (of the American Nuclear Society) and elsewhere which demonstrate operability and utility [validation]?

Where are the Examiner's substantive responses to the Applicant's publications in peer-reviewed journals with evidence demonstrating that he has correctly taught operability and enablement regarding loading and loading flux?

Where are the Examiner's substantive responses to the Applicant's publications in peer-reviewed journals which have taught standards and quality control ("Q/C") which are relevant to experimental operability?

Where are the Examiner's substantive responses to the Applicant's teachings of errors and artifacts which can give rise to false indications of "excess heat"?

The Applicant would like to know how many of Applicant's publications does it take in prestigious peer-reviewed journals before the Office (or Examiner) accepts the clear, substantiated, evidence that a technology exists? Applicant's publications in peer-reviewed journals confirm operability as taught years earlier in the original specification and claims.

### POINT 5: The Skilled-In-The-Art Support Applicant

10. To rebut the Examiner's Communication, in addition, reference is made to several Declarations, including the Declaration of Dr. Mitchell Swartz [especially the Declaration from October 22, 02]. Dr. Swartz, is qualified as an expert with four degrees in electrical engineering from MIT, and an MD from Harvard. The other affiants have probative value, including Hal Fox ["Fox declaration"; BS physics and mathematics from the University of Utah in 1951, an M.B.A. from the University of Utah in 1972, and has published extensively in this scientific field; Editor of *Fusion Facts* (ISSN#1051-8738) and *Journal of New Energy* (ISSN#1086-8259)], Dr. Eugene F. Mallove, (hereinafter called the "Mallove Declaration"; ScD Harvard, BS MIT; former Senior Science Writer in the Press Office for the Massachusetts Institute of Technology (Cambridge, MA); Editor of the journal "*COLD FUSION*" (ISSN#1074-5610) and *Infinite Energy* (ISSN#1081-6372)], Ms. Gayle Verner, Dana Rotegard, Dr. Robert Bass, Drs. Melvin Miles, Brian Ahern and Dr. Raymond Kurzweil.

The Declarations are evidence supporting the Applicant's position, and substantially and fully address all matters and issues criticized by the Examiner, and contain averments regarding evidence establishing the utility, validation, and operability of the Applicant's claimed subject matter. The Declarations contain factual statements directly addressing how the specification adequately described the subject matter recited in the claims. They demonstrate that a person of ordinary skill in the art would have understood the inventor to have been in possession of the claimed invention at the time of filing, and that the invention operates as stated, and as explicitly taught in the original specification and claims. The Declarations prove that the Applicant taught in the original specification and claims how his apparatus works and claimed the invention.

The Affiants, skilled-in-the-art, state that the "environment" in which the above-entitled invention operates "does exist" and that there is no evidence of "heat" and "loading". The Declarations include the Straus (4/22/94), Swartz, and other Declarations, including but not limited to the Amicus Curiae Briefs of Edmund Storms (2/21/01), Talbot Chubb (2/22/01), Eugene Mallove (3/24/00) and Hal Fox (2/21/01) and Affiants who have been the Office's own witnesses.

Where is the Examiner's substantive response to Applicant's cited Declarations, including the the Swartz declaration, the Declaration of Straus (4/22/94), and the Amicus Curiae Briefs of Drs. Edmund Storms (2/21/01), Talbot Chubb (2/22/01), Eugene Mallove (3/24/00) and Hal Fox (2/21/01)? In the new arguments made by the Office, there is no substantive response or answer to the Declarations previously submitted with the Applicant's last Communication to the Examiner even though the

Affiants addressed operability and utility of this invention, and even though said Declarations were referred to and addressed several times by Applicant. The Office fails to indicate which, if any, of the averments (or pages) in the Declarations and Amicus Curiae Briefs have been formally considered by the Office and, if so, how they reached their conclusion.

The Applicant would like to know how many Declarations does it take before the Office (or Examiner) accepts the clear, substantiated, evidence that a technology exists? The law says one. The Examiner will not answer, deprives Applicant of the Constitutional rights and simply ignores dozens or relevant timely-submitted Declarations.

**CONCLUSION:** The Declarations remain ignored in their factual content because they rebut the Offices' erroneous position about operability and utility. Validation occurs when scientists actually skilled, and working, in the state-of-the-art state it to be so. Scientists write the technical papers which undergo peer-review, file the patents applications, and attend international conferences, disagree with the Examiner. Given that in this case there has been no response to, or dispute of, said Declarations the Office is obligated by law to assume that all Declarants assertions are true [Lewis v. Bours, 119 Wn.2d 667, 670, 1992], and therefore, the Examiner has erred by failing to consider those skilled-in-the-art who counter the rejection under 35 U.S.C. §112 and §101.

#### **POINT 6: APPLICANT HAS PUBLICLY DEMONSTRATED HIS INVENTIONS**

11. The Applicant's system was demonstrated openly to the public at the Massachusetts Institute of Technology. It has been reported on in America, Europe, Japan, and Asia. They came. The Patent Office's counsel was invited to attend the meeting and demonstration, but he did not show up.

For example, about the Applicant and his invention(s), are the following. These include excerpts from Appendix B by Dr. Mallove and Mr. Miranda, which also demonstrate the existence of the field in which the above-entitled invention operates.

"Here are some of the high points to be taken from ICCF10:

"Dr. Mitchell Swartz's Fleischmann/Pons-type electrolytic palladium Phusor/low electrolyte conductance heavy water/platinum cell performed flawlessly in Prof. Hagelstein's lab at MIT during ICCF10. Its excess power ranged from 167% to 267% as Dr. Swartz altered the experimental conditions. This excess heat, as measured by his precision calorimeter, persisted from Sunday August 24 to August 30, longer than ICCF10 itself. The excess heat was interrupted on the last day only to bring the equipment back to Wellesley, MA otherwise it would have continued much longer."

[Dr. Eugene Mallove, editorial,

*Infinite Energy Magazine* No.51, 9/2003]

As another example:

"... There was even a "field trip" from the hotel where the conference was held in Cambridge, to Room 568 in Building 36 at MIT where a live "overunity" (more-power-out-than-in) cold fusion experiment was hosted by Dr. Mitchell Swartz."

[John Miranda, President  
ZerEpoint®, Appendix B]

As another example:

"Greetings. I am back from ICCF-10 but I have a rotten cold, so I am a decongestant daze. I can't even write. I write mainly by dictating to Naturally Speaking voice input, but the computer does not understand me when my nose is stuffed up.

"Swartz, and Dash et al., live demonstrations at MIT. Marvelous work! Bravo to everyone! McKubre said he would never have the guts to try this, because so much can go wrong when you move an experiment."

[Jed Rothwell, Subject: Impressions of ICCF-10, 3 Sep 2003]

As another example:

"Demonstrations - Three excess heat experiments were shown in live demonstrations at ICCF10, including two on August 26, in a laboratory at MIT that was open to the public: A cell in a precision calorimeter was shown by Mitchell Swartz and Gayle Verner at MIT."

[<http://lenr-canr.org/iccf10/iccf10.htm>]

And yet as another example:

"La dixième conférence internationale sur la fusion froide ICCF10 s'est tenue à Boston aux Etats-Unis, du 24 au 29 août 2003. 120 personnes de 15 nationalités différentes y ont participé. Elle était organisée par le Professeur Peter Hagelstein, du MIT. Ce fut l'occasion de prendre connaissance des derniers développements sur le sujet. Depuis 10 ans que je travaille sur ce thème, et ayant participé à ma septième conférence, j'ai été très impressionné par la qualité du travail présenté, tant du point de vue expérimental que théorique. Elle s'est encore améliorée par rapport à ce qui avait été présenté l'an dernier à Pékin.

"Deux démonstrations de fusion froide ont été présentées : l'une par le professeur John Dash de l'université de l'Oregon à Portland, et l'autre par le Dr Mitchell Swartz. Les deux expériences ont démontré la production d'excès de chaleur.

"... M. Swartz a obtenu de forts excès de chaleur, jusqu'à 300% avec de l'eau lourde ultra pure de résistivité 220 k $\Omega$ , sans rajout d'électrolyte, avec cathode de palladium hélicoïdale. Des cycles de chargement et de déchargement accroissent l'excès de chaleur. Une remarque importante, est la forte tension mesurée en circuit ouvert : 2.5 Volts."

[Rapport sur L'International Conference on Cold Fusion ICCF10,

[http://users.skynet.be/kurtgode/iccf\\_10\\_biberian.htm](http://users.skynet.be/kurtgode/iccf_10_biberian.htm)]

### POINT 7: The Literature Supports The Applicant

12. Where is the Examiner's Response to the more than 300 publications which the Applicant has sent the Office taken from peer-reviewed journals? or his response to Swartz. M., 1994 "Catastrophic Active Medium Hypothesis of Cold Fusion", Vol. 4. "Proceedings: "Fourth International Conference on Cold Fusion", sponsored by EPRI and the Office of Naval Research? This has been several hundred pounds of Exhibits, including over 40 of the Applicant's own peer-reviewed papers (several published by the American Nuclear Society, *Fusion Technology*)? Instead of a substantive response, in the new arguments made by the Office, there is ignoring of data, Exhibits, and Declarations, which the Applicant has supplied. The Exhibits constitute significant, growing reputable evidence of record which easily overcomes the few "negative" showings in the Office's ancient references, allegedly "disproving" the concept of "cold fusion". In contrast to the few "nay-sayers" the Office cites over and over, and in contrast to the "older" books, papers, and newspapers which cite failed experiments to which the Office refers to in its new argument, stand the Applicant's submitted original specification and supporting published papers, facts, Exhibits, and Declarations which demonstrate both the quality and quantity of corroborations of the existence of these reactions. Applicant's peer-reviewed published literature in series of published reports has more evidentiary value than the few "negative" less-credible recycled, older reports cited by the Examiner which do not even mention Applicant's work.

Where is the Examiner's Response to the fact that the U.S. Electric Power Research Institute (EPRI) has obtained positive results (Swartz 97A), as has NASA (Neidra 96A, Neidra 96B), the French atomic energy agency [confirming the cold fusion effect as originally reported by Dr. Fleischmann and Pons (Lonchamp 97)], and many US laboratories including US NAVY? Instead, the Office relies on its rebutted "reports" from "science" reporters and those competing for Federal funds, all of whom do not even refer to the present invention. Nor have they been sworn in, or have been proven to be an expert, as the Applicant has done with his Declarants.

Where is the Examiner's Response to Applicant's citation of Dr. Miles reports that near commensurate "ash" (i.e. order-of-magnitude expected amounts or greater) consistent with a nuclear process was found linking the formation of helium-4 to the excess heat using metal flasks which were used to capture the helium-4 linked to the excess heat [Miles (1993); also "US Navy Continues Positive Efforts Supporting Cold Fusion"; COLD FUSION TIMES (pages 1-2) volume 1, number 4 (1994)]?

"Our previous results present a correlation between the measured excess power and helium production in  $D_2O$ -LiOD electrolysis cells using palladium cathodes. The measured rate of  $^4He$  production ( $10^{11}$ - $10^{12}$   $^4He/s \cdot W$ ) is the correct magnitude for typical deuteron fusion reactions that yield helium as a product. \*\*\*\*\* Metal flasks were used to collect the electrolysis gas samples in order to minimize atmospheric contamination due to helium diffusion through glass. The helium concentrations in Table II support a detection limit of approximately  $10^{13}$   $^4He/500$  mL in these experiments as reported previously. Mean values for the measured helium concentrations in these control experiments are  $4.4 \pm 0.6$  ppb or  $5.1 \pm 0.7 \times 10^{13}$   $^4He/500$  mL. ... For experiments producing excess power, five helium measurements using these same metal flasks have been completed. These experiments yield a mean value of  $2.0 \pm 0.5 \times 10^{11}$   $^4He/s \cdot W$  after correcting for background levels of helium measured in control studies (Table II). This value is once again the correct magnitude for typical deuteron fusion reactions that yield  $^4He$  as a product."

["Heat And Helium Measurements In Deuterated Palladium"; M. M. Miles and B. F. Bush, Chemistry Division, Naval Air Warfare Center Weapons Division China Lake, CA USA (12/1993)]

13. Where is the Examiner's Response to Applicant's citation of confirmations of Dr. Miles' nuclear (helium-4) findings? Excess heat, tritium generation, and other products, produced by the desired reactions, have been found by scores of groups supporting Applicant's claims at the time these patent applications were filed. The reactions products (particles and excess energy) have been elicited both by the electrodeposition of deuterons onto palladium cathodes and by temperature cycling of deuterided palladium or titanium. Many of the laboratories publishing such results are listed in a table in Dr. Mallove's book on pages 246 through 248. The chief product of the cold fusion reaction(s) is excess heat [Mills 91, 94; Mizuno 96D; Storms 93; Arata 90; Swartz 97B; Mizuno 96D; Celani 96A; Storms 96A; Pons 90; Notoya 93; Fleischmann 89, 90; Mallove (Fire from Ice); Lonchamp 96, 97; Oriani 96; Mizuno 94; Bockris 90; Szpak 91B, 96A; McKubre 91; Will 91; Nobel 95 and Miles 94C, 96B], but other released particles have also been reported {including tritium [Srinivasan, Current Science, 143 (1991); Chene 90; Rout 91; Storms, Fusion Technology, 17, 680 (1990); also Notoya 94A, 94B; Will 93, 94; Claytor 96A, 96B], sparse neutrons [Gozzi, J. Fusion Energy, 9, 241 (1990); Menlove, J. Fusion Energy, 9, 495 (1990); also Gozzi 90A, 90B; Ogawa 96; Perfetti 89; Wada 89; Bittner 91; Celani 97], other particles [Karabut 92; Chambers 91; Taniguchi 89; Iwamura 94], helium-4 [Bush, J. Electro. Chem., 304, 271 (1991); also Miles 94C, Miles 91, 93B, 94C, 96B; Bush 96], some radiation [Szpak 96B; Celani (90)], and possibly heavy elements [Matsumoto, Fusion Technology, 20, 323 (1991), Karabut (92)] Matsumoto 92; also Ohmori 96A, 96B; Savvatimova 94, 95; Mizuno 96A, 96B, 96C; Miles 96C, 97A; Miley 96]}.

The reports of these products support the incontrovertibility of this new nuclear technology. The Examiner's own witness, Dr. Will demonstrated tritium production ["Reproducible tritium generation in electrochemical cells employing palladium cathodes with high deuterium loading, J. Electroanal. Chem 360 (1993) 161-176; confer also Will 1994]. Swartz (96B) describes several other reports of tritium production. Thus, based upon the above-discussed inadequacies of the art cited by the examiner, and most importantly based upon the growing abundance of "positive" more-recent literature there is evidence of fusion in a material using isotopic fuel.

Where is the Examiner's Response to literature supporting the measured products of the cold fusion reaction(s) including excess heat, but other released particles have also been reported {including tritium [Srinivasan, Current Science, 143 (1991); Storms, Fusion Technology, 17, 680 (1990)], sparse neutrons [Gozzi, J. Fusion Energy, 9, 241 (1990); Menlove, J. Fusion Energy, 9, 495 (1990)], helium-4 [Bush, J. Electro. Chem., 304, 271 (1991)], and possibly heavy elements [Matsumoto, Fusion Technology, 20, 323 (1991)]}? Where is the Examiner's Response to Swartz(92), Swartz(94A), Swartz (97A) and Swartz(99), but also Mallove pp246-248, Storms(90,93); Arata(90); Celani(90); Pons(90); Bockris(90); Szpak(91B); McKubre(91); Wl(91,93,94), Miles(94C,91,93B,94C); and McKubre, SRI ["Summary During ICCF-7", Infinite Energy, 4, 20, pp.31-35, (1998)]? Where is the Examiner's Response to (Hagelstein 93B), Storms (94C); Huggins 94, Savvatimova (94); McKubre (95), Itoh (95), Biberian (95), and Nobel (95), Kamimura (96), Lonchampt (6), Li (96A), Mizuno (96B), Kamimura (96); Miles (96C), Oriani (96), Claytor (96A), Celani (96B), Swartz 96B, Swartz 96A, Fox 96A, and Rothwell (96)? The vast number of papers in this field corroborates both the "existence" and the "utility" of these teachings.

14. Where is the Examiner's Response to the several hundred individuals who attend the conferences on the subject [ICCF-2, ICCF-3, ICCF-4, ICCF-5, ICCF-6, ICCF-7, ICCF-8, ICCF-9, and other meetings] who disagree with the Office's opinion.

Where is the Examiner's Response to any or all of the 9 volumes of the *Cold Fusion Times*? Where is the Examiner's Response to *Fusion Technology*, *Journal Of New Energy*, *Cold Fusion Times*, *Technology Review*, *Journal Of Electroanalytical Chemistry*, and *Journal Of Physical Chemistry*, etc., which publish on cold fusion despite the Office's opinion. The vast number of papers in this field corroborates both the "existence" and the "utility" of these teachings.

Where is the Examiner's Response to Aspden (UK GB 2,231,195B), Czirr (5,231,290), Westphal (5,215,631), Patterson (5,036,031) which have the words "cold fusion" within them?

Where is the Examiner's Response to Fox 96A, 96B, Verner 96, Rothwell 95, Oriani 95, and writings by Dr. Storms ["Excerpts from Dr. Storms' Letter to Congressman Dick Swett and (U.S.) Congressional Hearing", and Storms, "Cold Fusion Heats Up", *Technology Review* (1994) and also see Storms 91, 95 and 96B], and Dr. Charles Beaudette [Beaudette Paxton Award paper (1994). *Cold Fusion Times* volume 1, number 4, page 5 (1994); *The Torch*, volume 66, pages 3-7 (1993)]. Despite the myopia of the Office's new argument, the cold fusion technology has been discussed by, and shown to be important to, some members of U.S. Congress [Mallove, "Cold Fusion and Alternative Fusion Are the High Points of U.S. Congressional Fusion Energy Hearing" *Cold Fusion Times*, volume 1, issue 2, page 1-2, 4, 8 (1993); Mallove, "Report of an Important Meeting with the U.S. Congress", *Cold Fusion Times*, volume 1, issue 3, page 1, 4, 8 (1993); Storms, "A very "unscientific" and personal take on other cold fusion effects", *Cold Fusion*, volume 1, issue 1, page 43 (1994)], Schwinger ["Cold Fusion: Does It Have A Future - Look to the rising sun", *Cold Fusion*, volume 1, issue 1, pages 14-17 (1994)], Rothwell ["Cold Fusion quietly takes off in Japan", *Cold Fusion*, volume 1, issue 1, pages 24-31 (1994)] and Rothwell ["Cold Fusion and History", *Cold Fusion Times*, volume 1, issue 2, page 6, (1993)]. Other examples showing the "pulse" of the field include Mallove, "Why 'Cold Fusion'?" *Cold Fusion*, volume 1, issue 1, pages 4-6 (1994), and Rothwell, "Cold Fusion quietly takes off in Japan", *Cold Fusion*, volume 1, issue 1, pages 24-31 (1994))?

**15. The Applicant requests an answer to the question: How many publications does it take in prestigious peer-reviewed journals before the Office (or Examiner) accepts the clear, substantiated, evidence that a field of science and technology exists?**

Where is the Examiner's Response to Applicant's citing where the Examiner has been, presumably inadvertently or unintentionally, in conflict with the law? For example, pursuant to *In re Oetiker*, Applicant hereby did respond in full to each of the Examiner's points with discussion in detail. For example, pursuant to *In re Morris*, Applicant did respond with information including those skilled-in-the-art. Furthermore, pursuant to *In re Grey*, Applicant presented other evidence including those of operability and utility, including in said Declarations [thereby also consistent with *In re Porter*].

**POINT 8: Examiner Refuses To Respond Substantively**

16. The Examiner will not answer the Applicant substantively and directly.

The Office is absolutely non-responsive to much of Applicant's previous communication from the applicant to the examiner, dated 12/3/02. There was a certificate of mailing on page 95 therein, so it was received. The nature of the invention, along with introduction of some of the Declarations, was discussed in said previous communication from the Applicant to the Examiner, dated 12/3/02, such as on pages 11 and 12. The operability of this invention was discussed in the previous communication from the Applicant to the Examiner, dated 12/3/02, including on pages 57 through 85. Where is the Examiner's substantive response? Instead of a substantive response, the Examiner has ignored many of the Applicant's detailed Arguments.

The Office is substantively non-responsive to Applicant's submitted documents from application '970 (to which the Examiner did refer in passing) because said documents did precisely rebut the Examiner [including those dated 11/2/93 and 4/23/94, submitted 12/3/2002 and then resubmitted and discussed 5/5/03].

The Office is absolutely non-responsive to Applicant's several Exhibits Rebutting Examiner's new, flawed, arguments made 3/20/03 at final, submitted May 5, 2003.

The Office is absolutely non-responsive to Applicant's Declarations which did rebut the arguments used by the Examiner.

As further examples, when confronted that some of the Office's cited references are only theoretical criticisms, or that most of the Office's cited references involve poorly loaded, or otherwise inactive, samples, the Office is mute. By contrast, the Applicant has provided positive papers. This was discussed by Applicant, including in the Communication of Applicant dated 5/5/03 including therein on pages 36-76. Where is the Examiner's substantive response? There is NO response from the Examiner.

To the comment made by the Examiner's reference which incorrectly claims that no one in the field publishes negative results, this is false. The Applicant has published negative reports, including looking for metachronous particle emissions in experiments at MIT [M Swartz, "Possible Deuterium Production from Light Water Excess Enthalpy Experiments Using Nickel Cathodes", *Journal of New Energy*, 1, 3, 68-80 (1996)]. There is NO response from the Examiner.

In place of a cogent step-by-step substantive response, the Examiner has handwaved, and even presented new arguments at Final [also deeply flawed and simply wrong for several reasons including accuracy, quality, and relevance]. The Examiner knew of said "late-delivered arguments" before Final but cited them late so that the Applicant could not respond.

### **POINT 9: Factual Issues Support The Applicant**

17. The Examiner has made so many errors of fact and law that they are briefly summarized below in alphabetical order. Several of these errors were avoidable if the Examiner had fully and completely read the Applicant's previous responses. The Board is also referred to patent case Serial No. 07/760,970 [Appeal from the Board of Patent Appeals and Interferences No. 94-2920] of which the present-application is a Continuation. Attention is directed to the Appeal Brief [filed February 28, 1994; especially excerpts A40-A54, with an Appendix C, entitled "Barriers in Fusion in a Material"; A55-A59), also two Reply Briefs (A61-81), and the Declarations, and scores of Exhibits (A90-A99). Said Declarations include "Declaration of Dr. Mitchell Swartz" from November 17, 1992 involving Appendix C, the "Declaration of Appellant supporting the Appeal Brief" dated February 28, 1994, the Straus Declaration dated April 22, 1994 (A10), the Bass Declaration from April 17, 1996 (A22), and the "April 1996 Swartz Declaration" dated April 23, 1996 [A37-A39]. Appellant (then Applicant) demonstrated utility and operability as taught in the original specification and claims in the Straus (A10-A12), Swartz (A13-A21), and other Declarations (A22-A39, *vide infra*).

### **ERRORS OF FACT BY THE EXAMINER**

#### **== Error By Examiner Regarding Alibagli**

18. The Office egregious and odiously states to poison the record -- despite submitted un rebutted evidence from the Applicant,

*"It is noted in this respect that there has essentially been a continuing stream of publications showing that virtually none of the scientific community consider the alleged positive results of cold fusion experiments as being confirmed. ... In this respect, Applicant's attention is directed to ... Albagli et al ..."*

#### **THE TRUTH - The Examiner Cites Fraud Again**

The Examiner cites Alibagli which contains PROVEN FRAUD as the Examiner ignores the US Navy, the US Air Force, NASA, RLE, the American Nuclear Society. It is consistent with Federal requirements of truth and accuracy that the Examiner disingenuously again relies upon and give authority to papers which now have been shown by independent scientific authorities to have major errors or have proven fraud. Several additional peer-reviewed publications (including Fusion Technology and J. Electroanal. Chem) have exposed many significant flaws in the cited so-called "negative" papers upon which the Office leans on. For example, independent analyses (Noninski, cf. also Mallove) indicate that the experiments of the Massachusetts Institute of Technology [MIT] and Lewis -- despite reported apparently "negative result" may have actually demonstrated excess heat in their experiments which utilized heavy water. Based upon his research, Noninski (93; 91B) has dismissed the

references of Lewis, Miskelly, and those which cite early 1989 experiments at MIT's Plasma Fusion Center upon which the Examiner has so staunchly relied.

"Although much discussion was (and is still) devoted to whether ("cold fusion") is connected with any known nuclear reactions, the latter being widely questioned, there is no doubt that the general interest in the problem was provoked by the claim of the possibility of producing excess energy, i.e., energy surmounting the energy break-even value. Unlike the clearly negative indications so far in terms of known nuclear processes taking place, however, careful analysis reveals that the claims in the principal negative papers published so far with respect to the existence of excess energy are in disagreement with the raw experimental data whenever such is presented in those papers. This is very surprising indeed in view of the wide publicity these negative results have been given. An example of an improper analysis of their own experimental data by the authors is Ref. 1 (MIT Plasma Fusion Center Paper, Alibagli et alia), which we have already discussed. (ref. 2) Other examples of inappropriate method and improper interpretation of their own experimental data are (Lewis et alia) and (Miskelly et alia)."

[V. Noninski, Fusion Technology, vol. 23, pages 474-476 (1993).; "Notes On Two Papers Claiming No Evidence For The Existence Of Excess Energy During The Electrolysis Of 0.1 M LiOD /D2O With Palladium Cathodes"]

With all due respect, if the Examiner wishes to continue to quote altered data [Albagli] but continues to fail to cite, or explain the basis for ignoring, Applicant's evidence which was timely and repeatedly submitted [including in the Federal Appellate case regarding '457 in the Appendix therein at A203-204, A244, A278-A279, A3553-355, A367-A370, A391, and especially A368], then this communication shall demonstrate that personal notice was given of a Constitutional, statute, and civil rights violation, as well as Office communications containing knowingly disingenuous false statements known to be false *a priori* [Niehot'f v. Sahagian, 103 A.2d 211 (Me. 1954)] and is therefore a breach of duty [Rannard v. Lockheed Aircraft Corp., 26 Cal. 2d 149 (1945), 18 U.S.C. §1503]. The Office communication is thus in error [People v. Pierce, 66 Cal. 2d 53 (1967); U.S.v. Price, 86 S. Ct. 1152, 1157, footnote 7; Sawtelle v. Farrell, 70 F.3d 1381, 1387 (1st Cir. 1995); Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972); Pizarro v. Hotels Concorde Int'l, C.A., 907 F.2d 1256 (1st Cir. 1990); Peckham v. Continental Casualty Ins. Co., 895 F.2d 830, 836 (1st Cir. 1990); Donatelli v. National Hockey League, 893 F.2 459, 465 (1st Cir. 1990)].

### == Errors By Examiner Regarding Bosch, Balke, Rogers

19. The Office states,

*"Applicant's attention is directed to ... Bosch et al, Balke et al, Fleming et al, Rogers. ... These references provide further clear evidence that no excess heat is generated in such "cold fusion" systems nor is there any evidence of nuclear reactions taking place."*

### THE TRUTH - The Examiner Cites Technical Incorrect Papers

The Examiner cites Bosch, who with tongue-in-cheek claims to be the "Bavarian Bubble Bottle Team"), who purportedly attempting to repeat the initial F+P experiment. Because the sensitivity of their system is 300 milliwatts (page 165), it is unlikely they would have been able to detect the expected signal with their calorimetry which was circa 65 milliwatts excess heat. Bosch measured neutrons which are not produced (discussed elsewhere).

The cited arts have loadings which are insufficient. The Bosch cathode had a loading of less than 0.67, and that did not include correction for other depositions of other materials into or upon the cathode (page 172). This loading is now known to be too low (Swartz 97A). The "negative" results may be, in part, due to inadequate loading (Swartz 07/339,976), and/or the failure to monitor said loading of isotopic fuel (Swartz, (07/371,937\*\*), and/or to activate the loaded quantity of isotopic fuel in various ways (Swartz 07/339,976, Swartz 07/371,937\*\* and Swartz 07/760,970\*\*), and/or to drive at the right location (Swartz SN 08/406,457 [filed March 20, 1995]). As taught in Swartz 07/339,976, palladium must fill with, and thus physically absorb within it, enough deuterium to obtain the desired reactions.

The cited arts are not relevant. The Examiner cites Balke, which teaches a less relevant gas system which loaded palladium and titanium. The other references use neutrons.

The Examiner cites Rogers, which is a theoretical paper because some of the conclusions in Rogers are not inconsistent with cold fusion. For example, on page 484, Rogers discusses that gamma emission from the excited helium state is not allowed. This is generally correct except at very elevated temperatures (like hot fusion), and Swartz (97A) and Swartz 96B discusses how this actually enables the desired reactions.

### == Errors By Examiner Regarding Blue

20. The Examiner inaccurately states:

*"In Ref. XI, Dick Blue stated on the issue of confirmation of cold fusion results that 'four years into this business, it seems we are still counting the simple replications of Excess heat' and failing to note that none of the replications match in any significant additional details."*

*In Refs. V2 and W2, Dick Blue lays out why there are problems with the "cold fusion" process."*

The Applicant thanks the Examiner for the citation from Dr. Dick Blue, who the Applicant has cited in his peer-reviewed published papers, where the Applicant corrected some of his (and Jones') incorrect statements (*infra*). The Examiner cites a newsgroup posting by Dr. Blue from February 11, 1994. The Examiner quotes a posting from Dr. Blue; a reply to the Applicant from Dr. Blue dated February 11, 1994. In it, Dr. Blue discusses the work of others including Yamaguchi, and Miles. It is not relevant to the present invention except as it relates to F+P.

In it, Dr. Blue discusses cold fusion with Dr. Swartz. At the end of the posting, Dr. Blue -who is probably the most serious critic of cold fusion of the Internet- states,

**"I want to thank Mitchell for his frank responses."**

The Examiner also presents postings from Dr. Blue on May 7, 1993 in which he discusses the products of cold fusion with the Applicant, Dr. Mitchell Swartz. Therein, Dr. Swartz takes the time to answer Dr. Blue and the Examiner is referred to the Applicant's answer on page 2 therein,

**"also, the present information is that cold fusion ... has been confirmed in several configurations, has been tested by several respectable calorimetries, and is more complicated than first thought."**

The Applicant did not share the technology of the present application (or the others) with Dr. Blue, but instead did refer him to the peer-reviewed published articles, and did correct Dr. Blue's scientific errors such as will now be discussed.

### == Error By Blue And Examiner Regarding Special Relativity

21. The Office inaccurately states,

*"In a 1992 article in Surface and Coating Technology, Jones take the position that the claims of excess heat, tritium and helium production due to nuclear reactions are 'dubious to say the least' (note page 288) because there is no evidence of commensurate nuclear products. Note the reference to  $E=mc^2$  on page 286."*

#### **THE TRUTH - THE EXAMINER Errs Regarding Special Relativity**

In the Examiner's final citation of Dr. Blue, dated November 19, 1994, Dr. Blue discusses, albeit incorrectly, the Schrodinger equation. On page 2, Dr. Blue discusses the "the time scale for the transition process". Dr. Blue got it wrong, and the Applicant, Dr. Swartz, did fully completely, and accurately correct him in the

peer-reviewed journal of the American nuclear society [Phusons in Nuclear Reactions in Solids", Fusion Technology, 31, 228-236 (1997)].

Dr. Blue appears to have incorrectly derived the Schrodinger equation using "energy" rather than "the uncertainty in the energy". As the Examiner knows, the Schrodinger equation involves the relationship between either the uncertainties of mass and momentum or the uncertainties energy and time. In the case being discussed, the latter was invoked by Dr. Blue. As the Examiner knows, the product of the uncertainties is on the order of the number, called  $\hbar$ . Dr. Blue's error directly results from his use of the energy (E) rather than the uncertainty of energy ( $\Delta E$ ). This common error of those without adequate scientific education is discussed in significant detail in the Applicant's published paper "Phusons in Nuclear Reactions in Solids", Fusion Technology, 31, 228-236 (1997). Attention is directed to the section discussing special relativity therein where this matter is definitively and correctly discussed (after peer-review).

#### **== Error By Examiner Regarding Broad, Dagani, etc.**

22. The Office improperly offers "yellowed" newspaper and book accounts which are of questionable and low accuracy, and ignores Applicant's submitted evidence which was peer-reviewed by the American Nuclear Society. The Office disingenuously states,

*"The Dagani article in the 1/14/91 issue of C & EN states that the "cold fusion" claims are taking seriously by virtually none of the scientific community and that research at Utah's National Cold Fusion Institute (NCFI) as well as research elsewhere, have failed to establish the existence of cold fusion."*

*The Broad article in the 3/17/91 issue of the New York Times indicates some of the data relied on by Fleischmann and Pons as showing evidence of fusion was faulty."*

#### **THE TRUTH -- The Examiner Errs Regarding Followup Efforts**

The applicant discussed Dagani and the other matters once again improperly mentioned by the Examiner [who ignored the Applicant's previous responses which were in the previous communication to the Examiner on pages 83 through

The Examiner has not explained why he unduly relies upon non peer-reviewed periodicals and books which do not discuss Applicant's invention as he ignores the submitted evidence of the Applicant regarding operability or utility.

The Examiner has not explained why he has ignored, and did not discuss, so many of Applicant's arguments in this matter. First, perhaps to promote sales of the newspapers, the Office quotes "headline" events without any substantial data being presented. And it is important to note that some "headlines" are simply wrong.

Second, such "headlines", as opposed to the peer-reviewed articles cited by the Applicant in Fusion Technology, are not fair representative appraisals of new technologies.

Third, this is another case where the Office again takes selected, functionally "old" and out-of-date, biased excerpts to attempt to prove its "point". However, the very newspapers which the Examiner has cited now publish updates which herald that there is increasing acceptance of, interest in, and growth of this field [cf. Freedman (Science 4/24/92), Chandler (Boston Globe 4/17/92)]. As a result, it is reported that scientists are "quite convinced that there is a source of heat" [Prof. Philip Morrison as reported in Chandler] and are "not concerned about the lack of neutrons (expected in a conventional) fusion reaction" [Prof. Louis Smullin as reported in Freedman]. Dagani (1992) now reports that growing numbers of the scientific community do take seriously the "excess heat". See also Chandler, Freedman, Bishop.

Fourth, the Office cites old (~1991) articles, but there are many periodicals -- more recent -- which do support this field including the Wall Street Journal (Bishop (92); Bishop (93), Bishop (96)), New York Times (November 17, 1992, Pollack, and especially Clarke 1997). There are many periodicals which do support this field including the Wall Street Journal (Bishop (92); Bishop (93), Bishop (96)), New York Times (November 17, 1992, Pollack, and especially Clarke 1997). The Examiner should note that the Applicant has now supplemented these with even more references.

The Examiner has not explained why he unduly relies upon irrelevant papers which are totally theoretical. Some of these "negative theoretical" citations calculate, using what may be incorrect or false assumptions and approximations, that fusion of isotopic fuel in a material, ie. cold fusion, can not "work" (eg. Ohashi, Cribier, Chapline). The applicant respectfully asks the examiner to reconsider, because in actual fact such calculations were historically presented "proving" that heavier-than-air ships (ie. airplanes) "cannot fly". As another example: such calculations only created a virtual "drag" to the innovation of ideas, and their development and implementation, involving airships - which later evolved to include jets and spacecraft.

"Professor Goddard ... does not know the relation of action to reaction ... he only seems to lack the knowledge ladled out daily in our high schools"

[New York Times, January 13, 1920]

"... after a few more flashes in the pan, we shall hear very little more of Edison or his electric lamp. Every claim he makes has been tested and proved impracticable."

[New York Times, January 16, 1880]

### == Error By Examiner Regarding Flemming

23. The Examiner cites Fleming and other papers where the loading times are too short. For example, Fleming some were half a day, the longest was 5 days. Without the codepositional techniques taught in the original specification and claims of the above-entitled application, the times are weeks to achieve the desired reactions. Furthermore, the loadings were insufficient. Fleming only had a loading estimated at 0.75 (page 521). This loading is now known to be too low (Swartz 97A).

### == Errors By Examiner Regarding Jones

24. The Office states,

*"This apparent transformation of Jones from a 'cold fusion believer' to 'skeptical' is discussed by Dagani in the June 5, 1995 issue of C & EN."*

#### THE TRUTH - The Examiner Errs And Cites Less Than Relevant Work

The Applicant thanks the Examiner for the citation from Dr. Jones which is not relevant and is immaterial. It is interesting to watch Jones take both sides (see Taubes) and also publish the "positive" results in this field (Jones 89, Jones 90, Menlove and Jones et alia in Menlove 90B).

First, the Examiner should admit that Jones' positive work has been cited in issued US Patents including Czirr 5,231,290.

Second, the Examiner must accept that Jones now does again report neutron emission from these systems, as was presented this year at the APS meeting and then reported on in the Cold Fusion Times (Winter 2003 issue). The fact remain that Jones' experiment work now supports cold fusion.

The Office states,  
*"Jones et al .... in J. Phys. Chem, vol. 99, (1995) .... set forth reasons why the alleged  
 obtainment of excess heat in cold fusion systems, can not be relied on as valid."*

### **THE TRUTH -- The Examiner Errs On Jones' Errors Already Discussed**

The Examiner cites Jones' claims, but the Examiner egregiously ignores that the Applicant has already submitted contradicting un rebutted evidence and discussed that evidence including the errors in Jones explained with solid substantive response [A205,A251-A252,A291-292,A322; also A65,A70] including Jones' significant errors (Miles 93A, Miles 94A, 96A, Cravens 96, Tinsley 97). Dr. Miles, as just one example, discusses in great and sufficient detail said errors contained in the Jones papers in his 20 May 1998 to Mr. Dagani, Senior Editor, Chemical and Engineering News

"Enclosed is a reprint of my recently published reply to Jones-Hansen [J. Phys. Chem. B. 102, 3642 (1998)]. It was a long and difficult battle for me to have the opportunity to reply to the vicious attack of my work by the Jones-Hansen paper [J. Phys. Chem., 99, 6966 (1995)]. In my opinion, their paper contained many distortions and errors concerning my publications rather than the reasonable scientific dialogue that is so badly needed for this field.. ... Although critics like S.E. Jones and others have made it nearly impossible to obtain government funding for cold fusion, this research continues in many laboratories around the world. .... Unlike Jones and his 1989 report of cold fusion neutrons, I find no reason to retract any of my cold fusion claims. The recombination of deuterium and oxygen gases does not explain my excess heat measurements, and atmospheric contaminations do not explain my correlations between the excess power measured and the helium-4 produced in the experiments."

[Dr. Melvin H. Miles NAWCWPNS Fellow, DEPARTMENT OF THE NAVY  
 NAVAL AIR WARFARE CENTER WEAPONS DIVISION]

In addition, it is important to note that in addition to said errors, Jones has other significant errors as well which are not discussed in these cited references. For example, in Jones (95), the discussions of heat rate, thermoneutral potential, and input power are incorrect, and furthermore are not applicable to the present application and invention, as discussed in Swartz (96E) and Swartz (95, 97B).

### == Errors By Examiner Regarding Japan

25. The Examiner inaccurately states:

*"If cold fusion is real, demonstrable, or reproducible it would mean more to the Japanese than any other industrialized nation. .... the Japanese have terminated their three-year multi-million dollar effort to demonstrate and commercialize cold fusion."*

### THE TRUTH -- The Examiner Errs Because Japan Has Always Had CF R&D

This disingenuous new argument by the Office, that *"the Japanese have terminated their three-year multi-million dollar effort to demonstrate and commercialize cold fusion"* is wrong for several reasons. In fact, Japan pursued cold fusion before World War II (*Cold Fusion Times*, enclosed herein), and its efforts continue (*supra*).

First, Japan is made of many individuals and institutions, many of which continue cold fusion studies, and who disagree with the hearsay Office claim, as they diligently continue to publish, including [and each of which prove the Examiner and his cited art incorrect]: Arapi, Alban, Faculty of Engineering, Iwate University, Japan, Experimental Observation of New Element Production in the Deuteride and/or Hydride Palladium Electrodes Exposed to the Low Energy DC Glow-Discharge, *Cold Fusion Times*, Volume 10, Number 1, 2003; Arata, Achievement of Solid-State Plasma Fusion, *Cold Fusion Times* Fall 1997; Asami, T. Senjuh, T. Uehara, M. Sumi, H. Kamimura, S. Miyashita and K. Matsui R&D Center for New Hydrogen Energy, The Institute of Applied Energy 14-2, Nishishinbashi 1-chome, Minato-ku, Tokyo 105, Japan, Material Behavior Of Highly Deuterated Palladium, The Seventh International Conference On Cold Fusion. 1998; Iwamura, Yasuhiro, Takehiko Itoh, Mitsuru Sakano and Satoshi Sakai, Observation Of Low Energy Nuclear Reactions Induced By D2 Gas Permeation Through Pd Complexes, The Ninth International Conference on Cold Fusion. 2002. Beijing, China: Tsinghua University.; Iwamura, Yasuhiro, Mitsuru Sakano And Takehiko Itoh, Advanced Technology Research Center, Mitsubishi Heavy Industries Ltd., 1-8-1, Sachiura, Kanazawa-ku, Yokohama 236-8515, Japan, Elemental Analysis of Pd Complexes: Effects of D2 Gas, *Jpn. J. Appl. Phys.* Vol. 41 (2002) pp. 4642-4650, Part 1, No. 7A, July 2002; Iwamura, Takehiko Itoh, Nobuaki Gotoh, Mitsuru Sakano, Ichiro Toyoda And Hiroshi Sakata, Detection Of Anomalous Elements, X-Ray And Excess Heat Induced By Continuous Diffusion Of Deuterium Through Multi-Layer Cathode (Pd/CaO/Pd), The Seventh International Conference on Cold Fusion. 1998. Vancouver, Canada.; ENECO, Inc., Salt Lake City, UT. : p. 167, J. Kasagi, H. Yuki, T. Itoh, N. Kasajima, T. Ohtsuki and A. G. Lipson, Anomalousy Enhanced D(d,p)T Reaction In Pd And PdO Observed At Very Low Bombarding Energies, Seventh International Conference On Cold Fusion. 1998. Vancouver, Canada.; Eneco, Inc., Salt Lake City, Matsumoto, Taka-Aki, Hokkaido Univ, Japan, Generating Carbon Tubes And Films From Lead And Cadmium Wires During Underwater Spark Discharges, *Trans. American Nuclear Society, Low-Energy Nuclear Reactions* (2000), Mizuno, Tadahiko, Tadayoshi Ohmori 1, Kazuhisa Azumi, Tadashi

Akimoto And Akito Takahashi, Confirmation Of Heat Generation And Anomalous Element Caused; Mizuno, Tadahiko Tadayoshi Ohmori, Tadashi Akimoto, Hokkaido Univ, Japan, , Akito Takahashi, Osaka Univ, Japan, Neutronics, Heat and Products Induced by Plasma Electrolysis, Trans. American Nuclear Society, Low-Energy Nuclear Reactions (2000), Mizuno, Tadahiko, Experimental Confirmation of the Nuclear Reaction at Low Energy Caused by Electrolysis in the Electrolyte, Proceedings for the Symposium on Advanced Research in Energy Technology 2000, Hokkaido University, March 15, 16 and 17, 2000, pp. 95-106., Mizuno, Anomalous Isotopic Distribution after electrolysis, Cold Fusion Times Fall 1996, Mizuno, Tadahiko, Nuclear Transmutation: The Reality of Cold Fusion, Department of Nuclear Engineering Hokkaido National University, Japan, Mizuno, Tadahiko, Tadayoshi Ohmori, Tadashi Akimoto and Akito Takahashi, Production of Heat during Plasma Electrolysis in Liquid, Jpn. J. Appl. Phys. Vol.39 (2000), Mizuno, Tadashi Akimoto, Tadayoshi Ohmori 1 , Akito Takahashi, Relation Between Neutron Evolution And Deuterium Permeation With A Palladium Electrode, The Ninth International Conference on Cold Fusion. 2002. Beijing, China: Tsinghua University., Takahashi, Akito Masayuki Ohta, Osaka Univ, Japan, , Tadahiko Mizuno, Hokkaido Univ, Japan, Radiation-Less Fission Products by Selective Channel Low-Energy Photofission, Trans. American Nuclear Society, Low-Energy Nuclear Reactions (2000).

Second, the Examiner's disingenuous statement is indelibly rebutted by said Japanese efforts including Mitsubishi's recent paper on cold fusion in China at the 9th International Cold Fusion meeting on 4/02 (*supra*).

Third, groups in Japan are simply not relevant to the present application.

Fourth, if the cited groups had followed the present original specification they would have succeeded.

The Examiner, trying to undermine US security and the US Constitution is directed to additional CF confirmations which have been made by the Japanese [Mizuno (December 1993); Yamaguchi 90].

"The cold fusion phenomena were tested with use of proton conductor solid electrolyte plates maintained at 300~400 deg C. An anomalous level of excess heat evolution of the order of 100 watt  $\text{cm}^{-2}$  was observed during absorption/desorption cycles of deuterium-containing hydrogen gas under application of an alternate electric field. \*\*\*\* Samples were made from a mixture of  $\text{SrCO}_3$ ,  $\text{CeO}_2$ ,  $\text{Y}_2\text{O}_3$ , and  $\text{Nb}_2\text{O}_5$  powders. \*\*\*\* The heat generation from the proton conductor in the experiment of deuterium-containing hydrogen gas was estimated to be approximately 50 watt ( $\sim 100 \text{ watt cm}^{-2}$ ) over 20 hrs, or  $\sim 3.6 \text{ MJ}$  in total. The input power given to the sample was +18 V,  $\pm 40$  (micro) A, or  $7.2 \times 10^{-4}$  watt. Accordingly, the output-to-input power ratio was estimated to be as large as  $7 \times 10^4$ ."

["Anomalous Heat Evolution from  $\text{SrCeO}_3$ -Type Proton Conductors during Absorption/Desorption of Deuterium in Alternate Electric Field"; Tadahiko Mizuno, Michio Enyo, Tadashi Akimoto and Kazuhisa Azumi Hokkaido Univ., Sapporo, Japan (ICCF-4, December 1993)]

26. Despite the incorrect statements by the Examiner, similar confirmations of cold fusion and continued efforts have been made by the Chinese [Jin (December 1993); Li (95, 96A, 96B, 97), Jin (93, 94)].

"The experimental studies of YBCO-D system indicated that YBCO high temperature super-conductor (HTSC) was shown to have a similar effect on deuterium absorbability and anomalous nuclear effect like palladium(1). We found that  $\text{Y}_1\text{Ba}_2\text{Cu}_3\text{O}_{7-d}$  could absorb deuterium at normal temperature and forms  $\text{D}_x\text{Y}_1\text{Ba}_2\text{Cu}_3\text{O}_{7-d}$ . We also found that the deuterated YBCO could produce high energy charged particles far larger than background. The influence of the absorbed deuterium on the characteristic of YBCO HTSC and the mechanism of the anomalous nuclear effect are not clear and needed to be further studied."

["Deuterium Absorbability And Anomalous Nuclear Effect Of YBCO High Temperature Super-Conductor"; Jin Shang-Xian, Zhan Fu-Xiang And Liu Yu-Zhen, En Beijing, PRC (ICCF-4, December 1993)]

Also inconsistent with the Office's opinion and attempt to hurt the United States and its citizens, are Russia's reports also confirming cold fusion. For example, Kuchеров (1993) has confirmed the cold fusion phenomena in the gas glow discharge system.

"The results of four years of experimental work on glow discharge in deuterium with cathodes made of palladium and other materials are presented. About 500 experiments were made. \*\*\*\*. Neutron spectra showed neutron energies up to 17MeV with anomalous shift to high energies (five orders) relative to d-d reaction. .. Gamma-spectrometry showed low level radioactive isotopes formation. Together with half - life time measurements it allowed to identify some of the isotopes, such as Rh and Sr isotopes. Most of the lines (~100) are still unidentified. Non-background gamma-lines sometimes can be seen for few days. Most of the gamma-lines appear in lower than 300KeV region. X-ray films outside the chamber with led screens show some beam-like spots with energy 100-200 KeV. Charged particles registration with SSB and CR-39 detectors showed good correlation of the results obtained by these methods. Maximal observed fluxes of charged particles were  $\sim 10^6$  S-1. \*\*\*\*\* X-ray film with lead screens showed X-ray fluxes up to 10gs.] with soft (<1KeV) and hard (10-30KeV) components. Sometimes characteristic X-rays of palladium can be seen with Ge-Li detector."

["Calorimetric and Nuclear Products Measurements at Glow Discharge in Deuterium"; Yan Kuchеров, Alexander Karabut, Irina Savvatimova Scientific industrial Association "Luch", Podolsk, Moscow Region, Russian Federation (1993)]

Thus, there is growing evidence that the Office's opinion that cold fusion "does not exist" is incorrect, but is only made to usurp the United States Constitution, Congressional directive, law, custom, and Applicant's rights. Said evidence includes reports of the progress of cold fusion reveal a real scientific field in Japan, India, Russia, England and France ["Cold Fusion in Japan", Rothwell, *Cold Fusion Times*, v. 1, issue 3, page 1, 7, 9, (1993) and "Cold Fusion Impact - Global Response:", Fox, *Cold Fusion Times*, vol. 1, issue 2, p. 2, 5 (1993), Mallove, "Cold Fusion", May 1994 issue, vol 1 number 1]. The Examiner should consider "Why there?" The answer is this. Research has flourished mainly in those countries (Lonchampt 96) where patents issue.

27 As stated in the un rebutted Declaration of Mr. Fox,

"Few other countries have denied cold fusion inventors the rights to the fruits of their ingenuity. The most telling evidence is the fact that scores of patents on cold fusion have issued in other countries (over one-third of all patents issued have been to Japanese inventors and assignees). By contrast almost no patents on cold nuclear fusion have been granted by the U.S. Patent Office"

[Declaration of Hal Fox]

Therefore, the Applicant respectfully requests that the Examiner respond honestly to Applicant's submitted evidence about Japan, and then finally, tardively, admit the Office is incorrect. Work on cold fusion began in Japan before World War II and continues to this day. The US is now 14 years behind other countries because of the US Patent Office denies allowing valid patents to issue, thereby systematically ignoring both Constitutional and Congressional directive.

### == Error By Examiner Regarding Harwell

28. This latest new argument by the Examiner involves citations of the 1989 Harwell experiment. However, was there no evidence of any excess heat generated in any of the Harwell cells? Harwell had flawed analysis, and as the Examiner knows, but ignores and fails to comment upon, was shown by the U.S. Navy, upon close analysis, to have had positive results in Cell 3. Melich and Hansen (Melich 93) have reported that:

**"In Harwell's D<sub>2</sub>O Cell 3 there are more than ten time intervals where an unexplained power source or energy storage mechanism may be operating. \*\*\*Harwell Cells 1,2,3 and 4 were wired in series to a constant current source. \*\*\* Throughout these anomalous increases in temperature in Cell 3, Cell 4 behaves "normally", i.e., it suffers no unexplained pulses of energy. Our initial estimate of the power associated with these anomalous temperature increases is 100-200 mW."**

{Melich, M.E., Hansen, W.N., "Some Lessons from 3 Years of Electrochemical Calorimetry", in ICCF-3 Frontiers of Cold Fusion", Academy Press (1993), underlined for emphasis] Thus, Harwell's cell 3 supports the characterization of "positive results".

### == Errors By Examiner Regarding Huizenga

29. The Office states,

*"Applicant's attention is directed to .... Huizenga"*

#### **THE TRUTH -- The Examiner Relies On Old Inaccurate Books**

This citation of Dr. Huizenga's book is a new argument by the Office. It is a flawed new argument for several reasons ranging from relevance, to timeliness, to accuracy, and to the role of theory, and reliance upon fraud, upon which the book begins and ends.

First, the book has NOTHING to do with the present invention.

Second, the book is not up-to-date with respect to cold fusion, nor is it accurate. Most importantly, this book focuses on a few mistakes of a few individuals from 1989, and does not reflect either the science or engineering of the field in general today, or the present invention specifically.

Third, Huizenga's book and its unsubstantiated and inaccurate statements and claims have been criticized by many including Mallove (94; see also his Declarations). Dr. Huizenga would pass off the entire field as "pathological science", but given that he fails to read the literature, or respond to the issues in his book, his entire premise must be examined. Dr. Eugene Mallove, historian and scientist, has made some compelling comments about this phrase used against those in the field of cold fusion

"Pathological science" became the common insult, as few noticed that pathological skepticism about a new phenomenon was the real problem. Contrary to the media's perception, cold fusion never died and was certainly never disproved; it simply went underground as groups of courageous scientists in over a dozen countries mounted a concerted effort to understand and reproduce the mysterious phenomenon. Thanks to their hard work, it has survived."

[Mallove, *"Cold Fusion"*, May 1994 issue, vol. 1, number 1]

Other discussion of the errors in Huizenga was made with solid substantive response [A206, A243, A275-276, A279, A294-295 in the Federal case and elsewhere] although it is systematically ignored by the Examiner to deprive the Applicant of his Constitutional and civil rights. Where is Huizenga's or the Office's response?

Fourth, attention is drawn to the simple fact that no "Epilogue" by one writer can refute the copious -- and growing -- data which exists for cold fusion. Many attendees at the ICCF-4 meeting in Maui (including the Applicant) watched the elderly tired Dr. Huizenga sleep on a couch in the hotel during said Conference; even as three (3) simultaneous meetings were going on at that time. Dr. Huizenga appeared tired and worn, woke up later, after missing scores of meetings, and reported that there was "nothing new". This is preposterous and inaccurate, but Dr. Huizenga is entitled to his inaccurate opinion and his sleep.

Fifth, Huizenga's book relies on theories against cold fusion because of the unusual (compared with hot fusion) branching ratio. Some of these "negative theoretical" citations by the examiner calculate, using what may be incorrect or false assumptions and approximations, that fusion of isotopic fuel in a material, i.e. cold fusion, can not "work" (e.g. Ohashi, Cribier, Chapline). There exist other theoretical papers which may explain the observed cold fusion phenomena (e.g. Hagelstein 90, 91, 1993A, 94; Takahashi (91), Swartz 1992, 94A, 96B, 97A, 97B; McNally 89; Hora 93; Johnson 94; Mills 94; Mills 95; Li 95; Kim 90, 94A, 94B, 95, 96; Matsumoto 89; Chubb 90, 91, 94A, 94B; Szpak 91; Tajima (90); Schneider 89; Rice 90, Zhu 90, and Bush 91A). These theories involve loading, material destruction, and nuclear reactions including tunneling, screening, and many other issues. These papers reflect solid research and support the existence of the field but are ignored by the Office. The

applicant respectfully asks the Board to reconsider, because in actual fact such calculations were historically presented "proving" that heavier-than-air ships (i.e. airplanes) "cannot fly". Such calculations only created a virtual "drag" to the innovation of ideas, and their development and implementation, involving said airships - which later evolved to include jet planes and spacecraft.

30. The Office states,

*"note the following comments by Huizenga (IV) under the heading Reproducibility"*

*"Note particularly pages 1 25, 222, 223, of Huizenga (1) which refer to the lack of reproducibility of the alleged "positive" cold fusion results."*

#### **THE TRUTH - Reproducibility Is A Relative Issue**

The Office brings up a new argument about the purported non-"reproducibility" of these phenomena, as a "reason" for rejection. However, there are several errors with this logic and new argument.

First, the Examiner's and his cited art's arguments are clouded by the two different meanings of the word(s) "(not) reproducible". In the parlance of the Office, when referring to "cold fusion", the word(s) "(not) reproducible" are a euphemism for "wrong". When used more generally, however, these words can even apply to scientific (and medical) fields which actually do engender respect and/or validity, and where "reproducible" only refers to the number of samples in a cohort developing the desired effect. The restriction that the Office creates using the word "reproducible" in the present case would obviously create unreasonable hurdles for inventors in such fields as cancer treatment, meteorology, or the sciences of earthquakes, lightning, sunspots, or solar storms.

Second, despite the erroneous logic of the office, radiation therapy accounts for the cure of more than 60% of adults afflicted with solid tumors composed of malignant disease, and obtunds the pain in 80% (or more) of patients treated palliatively, there is almost always a clinical effectiveness. Yet it is not possible to know in advance which patients are going to be cured nor is it necessarily reproducible in any single patient. Thus there is clinical proof and utility, despite the lack of reproducibility in any single individual or cohort of patients. Thus, the claim that "reproducibility" must necessarily be absolute for there to be "utility" is also simply not true. Would the Examiner withhold curative treatment of a patient --of their own family member-- because such therapy is not "reproducible"? In summary, if the Office throws out cold fusion patent applications because there is not 100% reproducibility for each experiment, then probably all of the pharmaceutical and biomedical device patents should, for similar reasons, be voided *nunc pro tunc*.

### == Error By Examiner Regarding Merriman

31. The Office states,

*"Applicant's attention is directed to ... Merriman et al"*

The applicant thanks the Examiner for providing a copy of the website of Dr. Barry Merriman. Dr. Merriman has made several comments about Dr. Swartz. One of those comments is in the last page of the Examiner's cited art.

The Examiner cites a paper by Dr. Barry Merriman, entitled "An Attempted Replication of the CETI Cold Fusion Experiment". In the paper, Merriman attempts to reproduce an experiment of someone other than the Applicant, and of a system other than the present application or any of the other applications of the Applicant. Therefore, Merriman is not relevant.

Most importantly, it is presumed that the reason that the Office cited this paper is because Dr. Merriman cites the Applicant, Dr. Swartz, on page 17, of 17. On that page, although Dr. Merriman is critical of many people in their efforts stating that they are "neutral -- to wildly optimistic", but of the Applicant of the above-entitled invention, Dr. Merriman states,

**"Dr. Mitchell Swartz is cold fusion times is unabashedly pro -- CF, but serious, scientifically oriented online magazine."**

With that complement by the offices witness supplementing the unrebutted Declarations and the copious unrebutted peer-reviewed publications [including Swartz, M., 1994 "Catastrophic Active Medium Hypothesis of Cold Fusion", Vol. 4 "Proceedings: "Fourth International Conference on Cold Fusion", sponsored by EPRI and the Office of Naval Research] and other Exhibits, the Applicant now hopes the Examiner will reconsider and issue this patent.

### == Error By Examiner Regarding Miller And Bass

32. The Examiner inaccurately states:

*"... attention is directed to the MEMO (dated 10/9/97) from Bennett Miller to Dr. Robert W. Bass. ... the conclusion of the Miller Memo is that there is still no concrete evidence of excess heat ... Abide by the process."*

#### **THE TRUTH - The Examiner Errs By Citing Someone Opposed To Solar-Cells And Alternative Energy**

In new argument by the Examiner in the above-entitled application, the Examiner cites Dr. Miller extensively. There are several problems with this citation.

First, Miller does not discuss this invention or ANY of Applicant's work (published and/or unpublished). It is therefore not relevant. Miller is admittedly INCONCLUSIVE. Miller states that "it can be argued that the tests were inconclusive for a number of reasons".

Second, Miller is technically inaccurate about cold fusion situation in Japan. Miller confuses the Toyota/IMRA effort (with F+P in Sophia Antipolis) with the

IAE-NHE Laboratory (Shin Sapporo) which was under the aegis of MITI/NEDO and was officially "closed" after 3.5 years of an intended 3 year effort.

In fact, Japan pursued cold fusion before World War II (*Cold Fusion Times*, enclosed herein), and its efforts continue (*supra*).

Third, Miller suggests the use of peer-review. As discussed in the Verner Declaration, the Applicant has done just that,

**"I have witnessed Dr. Swartz operate his equipment in front of visitors to the laboratory including Professors Louis Smullin and Keith Johnson from MIT and others."**

Applicant has submitted more than 40 peer-reviewed papers and that is abiding by the process, as the Examiner surely would agree. What could be more compliant with Miller's suggestions than that?

Fourth, discussion of errors in Miller, was previously made with solid substantive response [e.g. in the Federal Appendix A316-317, A321]. Where is the Examiner's response?

Fifth, it appears that Miller was also against solar-cell technology in the '70s and therefore has a history of opposing alternative energy sources (like solar cells), and his opinion must be further discounted accordingly.

Sixth, the Applicant includes a letter which he wrote to Dr. Miller about his cited, inaccurate, report. Dr. Miller never responded to that to this date.

### == Errors By Examiner Regarding Morrison

33. The Office states,

*"In this same vein, note the negative comments in Morrison regarding the claims by Fleischmann and Pons, of excess enthalpy in their cold fusion cells which were made to boil."*

### THE TRUTH - The Examiner Errs By Citing Possible Hate Crime

There are several problems with the Office's reliance upon the late Douglas Morrison. First, the criticism now cited by the Office in new argument has been addressed elsewhere (and shown to be wrong). Specifically, the *Cold Fusion Times* (pages 1, 2, 6, 8, 10-11) volume 1, issue 3 (1993) included an update by Drs. Fleischmann and Pons who have responded in great detail to said "criticism" of their work ["Response to Critique of Physics Letters A Paper", *Cold Fusion Times* (pages 1,2, 6, 8, 10-11) volume 1, issue 3 (1993)].

\*\*\*\* -- Attention is directed to the fact that Applicant's publications in peer-reviewed journals are NOT press releases or web-chatter unlike those on whom the Examiner relies and cites.

Second, discussion of the errors in Morrison was previously made by the Applicant with solid substantive response [A252-253, A292-A293, A323 in the Federal case] and conveniently ignored by the Examiner.

Third, Morrison, previously a serious worker in hot fusion community (CERN), deviated and then widely lectured on subjects such as unidentified flying objects (UFOs) and the Loch Ness monster. He tried to relate them to the more serious serious well-credentialed scientists in the field of cold fusion. To do so, Douglas Morrison preached his own elitist dictum based upon his "view" of science being "superior" in certain locations. Morrison implied that "good" science can only be done by a handful of "good" research institutes which are all located only in Northern Europe and the Northeastern United States. Morrison stated that other people located in Southern Europe, Asia, and Southern U.S. --and who perform research there-- are inferior scientists, who can only produce at best marginal, "bad," inconsequential, science or as he puts it "pathological" science. As proof, the following excerpt is from the Office's reference, taken from the video transcript cited by the Office.

*"A disturbing pattern emerged in cold fusion experiments. Labs at high prestige universities generally got negative results. Elsewhere results were often positive." [World map is displayed with this voice-over, then Mr. Morrison speaks on camera]: 'I was absolutely astonished when I took northern Europe -- northwestern Europe. All the results were, no, no, no, no -- they couldn't find it. And when I took southern Europe it was all yes, yes, yes. And when I took eastern Europe it was all yes, yes, yes. The United States divided into two parts. If you took the major laboratories and what I call the greater region of The New York Times -- where it was read very much -- it was no, no, no. If you took the remainder of the United States -- the southern part of the United States, it was yes, yes, yes.... This rather horrified me.'"*

[Morrison, 1991, cited by the Office]

This is called the Morrison "Regionalization of Results" theory [1990 "Review of Cold Fusion"]. His detractors point out that this is tantamount to "Aryan Science Numerology" because by whatever name for this scheme, this Aryan/Regionalization theory has nothing to do with either science or the above-entitled application, but involves elements of "hate crime". Like most elitists, Morrison did not hide his opinions. By attacking scientists' results based upon where their laboratory was located makes Morrison's -- and the Office's {since they cite him} -- prejudices quite clear. It is wrong for the Office to again endorse this, and thereby align the United States of America with such salient discrimination, hate crime, and prejudice.

Finally, the Applicant includes a letter which he once wrote to Dr. Morrison about his inaccurate report. Dr. Morrison never answered with any response or rebuttal, probably because of his inaccuracies.

The Office states,

*"Later in the article it was written 'Simply put, in its current state, it could provide boiling water for a cup of tea.' Time delay to this working mode! - Zero years."*

#### **THE TRUTH - The Examiner Errs By Ignoring Data**

Although this may be true for the art cited by Morrision, it is NOT true for the Applicant. Attached to this Response are experimental runs for Applicant's invention using this system (heavy water, codeposition, palladium, palladium) giving rise to sufficient temperatures such as Morrision requested. The temperature curves show that the water was sufficient temperature to burn a person, and that it is probably too hot for a "cup of tea". The facts speak for themselves, and the Examiner is respectfully again requested to deal with them honestly, rather than attempting to usurp Constitutional and civil rights of the Applicant.

#### **== Errors By Examiner Regarding Murray**

34. The Examiner inaccurately states:

*In Ref. U2, Rich Murray raised questions about the Applicant's paper, I: Consistency of the Biphasic Nature of Excess Enthalpy in Solid State Anomalous Phenomena With the Quasi-1-Dimensional Loading Into a Material." Murray noted that for evaluation, details such as exact dimensions and locations of components of the calorimeter are needed. Murray also expressed concern about error ranges being so large."*

#### **THE TRUTH - The Examiner Errs By Relying On Netchatter**

The Examiner cites a posting by Mr. Richard Murray, dated March 21, 1998. In the netpost, Mr. Murray briefly and superficially discusses the paper which the Applicant published in the peer-reviewed journal of the American Nuclear Society without evidence that he actually read the paper. We will ignore for the moment that THIS patent involves a different peer-reviewed publication [Swartz. M., 1994 "Catastrophic Active Medium Hypothesis of Cold Fusion", Vol. 4. "Proceedings: "Fourth International Conference on Cold Fusion", sponsored by EPRI and the Office of Naval Research]. In such a light of non-relevance, Murray makes manner errors and critical admissions.

First, the Examiner's attention is directed to fact that Mr. Murray is concerned about the "flawed references" in said paper. In fact, in his very critical attack on cold fusion, Mr. Murray states,

*"Swartz has arrived at the scene like the enterprise, almost the only survivor."*

Second, Mr. Murray's comments, however, are shallow, not very scientific, a mixed with terms like "Borg attack", "Halloween", and "the shadow knows". In the prism of this background, Mr. Murray's comments are those of "armchair net chatter".

Third, most importantly, the Examiner should know that the Applicant Dr. Swartz has responded to Mr. Murray and a copy of that is appended. In said response, Applicant informed Mr. Murray of the following.

**"Also, in addition to references 1-7, additional nickel excess heat has been confirmed by NASA and by two separate labs at MIT where the investigators have not published their work."**

For the Examiner's interest, those MIT laboratories are Lincoln and Draper Laboratories, the identity of which those that conducted said work asked the Applicant to not post the locations on the Internet.

Mr. Murray did not read the paper, and the biggest clue was his misunderstanding of the electrochemical setup, so the Applicant corrected him,

**"Actually, the iron and aluminum were in alternate electrical paths in the same electrolyte. This was stated in the paper. Therefore, these were correct controls. BTW, we had tried them separately as well. We know nickel works, and iron does not. We know that platinum if exposed to nickel as the anode, can develop nickel cathodically plated out upon its surface which can apparently create some of the reaction, leading to platinum, in my experience, once used and exposed to such nickel deposition probably not being a good control unless the surface is cleaned of the plated nickel. This was also stated in the paper."**

As the Examiner knows, it was also taught in the patent application filed years earlier.

Mr. Murray was not knowledgeable about thermal stratification which generates in continuum media (including possible Bernard instability), so the Applicant corrected him.

**"Despite, Mr. Murray's implication, we have measured with redundant systems, and at many points within the electrolytic cells. Furthermore, we have examined various thermometric systems to get the thermometry right before the calorimetry. This was stated in the paper. Therefore this internal thermal stratification is NOT an issue. Furthermore we measured the excess (or otherwise for the other materials) heat in a multiring system, and the subsequent rings also corrected for that issue. This was also stated in the paper."**

**"If Mr. Murray, or more likely a student or research of the field, would like to read further in the literature and apply some numbers, he/she might try issues of greater quantitative significance, such as discussed in Swartz, M., 1996, "Relative Impact of Thermal Stratification of the Air**

**"Surrounding a Calorimeter", Journal of New Energy, 2, 219-221 (1996). For example, the development of hydrogen over the cathode during electrolysis increases the thermal conductivity making the measured excess heat potentially a "lower limit" because the calorimetric thermal leakage increases with the generation of H<sub>2</sub> or D<sub>2</sub> in the pericathodic volume above the electrode. "**

As the Examiner knows, this too was also taught in the patent application filed years earlier.

The Examiner should know that the dean of American electrochemistry, Dr. Bockris, has also responded to another of Mr. Murray's inaccurate and unscientific diatribes attacking Dr. Miley, the past Editor of *Fusion Technology*.

### == Error By Examiner Regarding Neutrons

35. The Office states,

*"what are the specific conditions under which said neutronpenic levels can occur?"*

#### **THE TRUTH - Neutrons Are Not Relevant To The Present Invention**

The Examiner is referred to the Phuson paper by the Applicant [*"Phusons in Nuclear Reactions in Solids"*, *Fusion Technology*, 31, 228-236 (1997)]. Fusion of isotopic fuel in a material does not usually produce significant numbers of neutrons external to said material. Therefore, many of the so-called putative "negative" results do not negate anything at all because the absence of neutrons is not the evidence of the absence of fusion of isotopic fuels in a material [eg. Williams, Kreysa, Ziegler, Hajdas, Faller, Alber, and Lewis].

Furthermore, the actual generation of neutrons although unlikely is discussed in the Examiner's cited work. These positive results include Shani, who monitored stimulated neutron radiation from deuterated materials after said deuterated materials were neutron-irradiated. Also Jones. In fact there have been many reports of low level neutrons from these systems (Gozzi 92; Wolf 90; Arata (90); Menlove 90A, 90B, Takahashi 91, Scott (90); De Nino (89); Yamaguchi (90); and Mallove (see *Fire from Ice*).

### == Error By Examiner Regarding NOVA

36. The Office inaccurately states,

*"Applicant's attention is directed to .... NOVA. ... In this respect, the television show on NOVA entitled, "Confusion in a Jar", indicated that in these cold fusion experiments, it is fairly easy to get quick results which could be "interpreted" as providing evidence of "cold fusion" but that in very carefully run experiments which were rechecked, etc., such as by using several different methods and/or detectors to attempt to detect the same presumed experimental results, the end result was negative."*

### **THE TRUTH - The Examiner Errs By Ignoring That Videos Were Submitted Several Times Rebutting NOVA**

The Examiner cites the "ancient" NOVA tape. The applicant discussed the videos in the previous communication to the Examiner. Where are the Examiner's substantive responses to the previous submitted response by the Applicant? The Examiner has ignored that the Office cited the NOVA video before repeatedly, and each time the Applicant responded with three (3) videos [CBC (1993), CBC (1994); BBC (1994)] on May 26, 1997 and November 8, 1997. The Examiner should examine the three (3) videos which Applicant sent [CBC (1993), CBC (1994); BBC (1994)] to the file folder, of which this application is a Divisional. Said videos rebut the Examiner. The Applicant's videos rebut the Office's reliance and dependence upon an older less accurate video (A10-A13, A18; A197, A240, A323-325, A327-330, A339 in the previously submitted Exhibits rendered with Applicant's response). Unlike the older NOVA video, other more recent documentaries -- already supplied to the Office by the Appellant -- made by reputable production groups such as the Canadian Broadcasting Company [CBC (1993), CBC (1994)] and the British Broadcasting Company [BBC (1994)] have meticulously researched and reported the truth surrounding cold fusion. Scores of individuals in the scientific community have contributed to the latter documentaries, and by doing so declare the Office's flawed opinion on these matters to be wrong. Those references which are cited by the Examiner are not only stale, but should be handicapped by the Examiner because many are in error, and simply did not get it right. In contrast, the references supplied by the Applicant show the present state-of-the-art, including publications by those actually working in the state-of-the-art.

Given the extensive "positive" published results which confirm the generation of products (including excess enthalpy) using isotopic fuel loaded into a material, the applicant therefore respectfully requests that the Examiner reconsider the rejection.

### == Error By Examiner Regarding Rousseau

37. The Examiner cites Rousseau. This new argument is very flawed. First, as before, the Office again takes selected and older and biased excerpts to attempt to prove its "point".

Second, the Office confuses purported "pathological science" with now-documented "pathological skepticism".

Third, the authors whom the Office cites do not describe, or respond to, or show, the invention of the present above-entitled application.

Fourth, Dagani admits that [Dagani (1992)] growing numbers of the scientific community do take seriously the "excess heat" of cold fusion [cf. Freedman (Science 4/24/92), Chandler (Boston Globe 4/17/92), Arthur C. Clarke in Discover Magazine 5/1997]. As a result, it has been reported that scientists are "quite convinced that there is a source of heat" [e.g. Prof. Philip Morrison as reported in Chandler] and are "not concerned about the lack of neutrons (expected in a conventional) fusion reaction" [e.g. Prof. Louis Smullin as reported in Freedman].

Fifth, the United States Patent Office itself has issued patents in this field, and they have been discussed by the very same authors whom the Office cites.

**"A bottle no bigger than a man's fist is creating an unusual stir among power generation engineers. The bottle is filled with ordinary water and microscopic palladium coated beads. When a little electric current trickles through the bottle, several hundred times as much power starts coming out in the form of heat - that is, if one cares to believe the instruments attached to the bottle. ... Yet supporters say something is going on inside the little heat producing bottle. As with the Utah apparatus, it's claimed that the bottle produces an excess of power as it electrolyzes, or breaks down, water molecules into hydrogen and oxygen atoms. But unlike the controversial and unpredictable Utah experiments, The Patterson cell can be turned on and off seemingly at will. Several working devices built by Dr. Patterson have been made available to two teams. "This is the first time what we have a system that seems to work every time," says a nuclear chemist who consults to utilities. The cell's reliability, which would allow scientists to manipulate it, "gives us our first chance to see if this [phenomenon] involves a nuclear reaction," he explains. "Moreover, the U.S. Patent and Trademark Office, which has flatly said that cold fusion, like perpetual motion, is impossible and unpatentable, has issued a patent on the gadget."**

[Jerry E. Bishop, *The Wall Street Journal*,  
January 29, 1996, underline added for emphasis]

### == Errors By Examiner Regarding Silveria and Myers

38. The Examiner cites Silvera and Myers. However, they did not achieve their loading by the method described in the present original specification, and therefore does not apply. Specifically, Silvera (90) used a diamond anvil to attempt to load palladium with deuterons. Although high pressure was obtained, the reaction was monitored by neutron detectors, and neutrons are not the proper signal for these types of reactions, even if they were achieved by the quite different system of Silvera (90). Also, Silvera may have seen a slight increase, as it is difficult to state since there were insufficient initial background levels reported (Fig 3, page 9145, Silvera (90). Furthermore, the papers states: "The neutron detector had deviations of 0.3 counts/h from the average of 2.1 counts/h, which we did not consider to be significant (bottom column 1, page 9145, Silvera (90)).

Myers et alia (90) used a 10,000 volt ion implantation cryogenic (41 to 81 degrees Kelvin) technique to load palladium with deuterons. Although high pressure was obtained, the these were quite inhomogeneous (see figure 5, page 266, Myers (90)). The reaction was monitored for 15 hours by charged particle detectors. Such detectors may not be the proper signal for these types of reactions (Mallove, also vide supra), even if they were achieved by the quite different system of Myers (90). Also, Myers did see a very slight output consistent with some possible fusion reaction (see figure 1, page 264, Myers (90)) which created 300 counts per channel of tritons. Furthermore, Myers only did this for 15 hours, which is too short (confer Swartz 97E).

Silveria and Myers demonstrates the field is real, and that many would have benefited by the granting of the patent described in the original specification and claims of the above-entitled application.

### == Error By Examiner Regarding Taylor

39. The Office states,

*"In the Taylor et al article (co-authored by Jones), which was submitted to the Fourth International Conf. On Cold Fusion (held Dec. 1993), it is stated in regard to the detection of neutrons from their cold fusion experiments, "The results do not provide compelling evidence of neutron production" (note particularly abstract and pages 6, 7, 9, 10)."*

### THE TRUTH - The Examiner Errs Because Taylor And Jones Describe Neutron Emission

Actually, the Taylor article itself describes a possible evidence of neutron emission. There was a 2-sigma deviation in the sample that demonstrated tritium. That "coincidence" is acknowledged in the article, and some of the authors admit that they should have repeated that several more times. The Examiner should read the cited articles, and also confer with the Jones neutron paragraph above.

### == Errors By Examiner Regarding Taubes

40. The Office states,

*"The article by Taubes on pages 299-304 of the 6/15/90 issue of Science, explains why the alleged detection of tritium at Texas A & M cannot be relied on as evidence of "cold fusion" actually taking place."*

### THE TRUTH -

The Examiner cites Taubes. This new argument and reference to Taubes is both wrong, irrelevant, immaterial, and egregious. Taubes focuses on a few mistakes of a few individuals from 1989, and does not reflect either the science or engineering of the field in general today, or the present invention in specific. Taubes (like Huizenga) is a career-"negativist" to this field who makes a living off of his book. However, Taubes is a science reporter and not a scientist. Nor has he been sworn in or proven by the Office to be an expert in these matters as the Applicant has done with the Declarants to date.

First, not only did no alleged tampering take place, but the generation of detected tritium has actually been confirmed elsewhere including in US national laboratories. Furthermore, the dynamics of the tritium which did appear, could probably not have been "spiked" as discussed in Mr. Taubes' unsubstantiated allegations crafted as innuendo to which the Office refers. Both Taubes, and now the Office repeatedly and thus odiously, have impugned individuals did not deserve it.

Second, the Office's reliance on such a purported dubious incident has **NOTHING TO DO WITH** the original specification of the above-entitled application.

Third, Taubes' book has many silly errors including claims that researchers in this field do not measure electric current, or baseline levels. This is fabricated nonsense. In fact, the Figures in the original specification of the above-entitled application and the other of the Applicant's inventions and peer-reviewed publications show that any purported absence of current measurement or baseline levels is simply not true for the present invention.

Fourth, Taubes' book has been severely -- and correctly -- criticized by Miles (92A), also Miles (92B), and Hoffman (94). Also see Mallove.

### == Error By Examiner Regarding Ward

41. The Examiner inaccurately states:

*"In Ref. W1, an individual noted that the Applicant first made a statement that Cold fusion is real" and then later on stated that "a single experiment demonstrating excess heat is insufficient to convince, but only shows a vector for further diligent work and study. The individual then stated, "to convince me of your (i.e., Applicant's) statement, that cold fusion is real, you need to show me at least one paper reporting clear, convincing, reproduceable, unmistakable heat production."*

### **THE TRUTH - The Examiner Errs Vy Citing Netchatter Rather Than Scientists Skilled-In-The-Art**

The Examiner cites a net posting by Bill Ward on March 7, 1998. In it, Bill Ward indicates that he's interested in cold fusion but that he was disappointed that the Applicant, Dr. Swartz, did not take time from his busy schedule, then as visiting scientist at MIT and from his patients, and from his laboratory efforts, to "spoon-feed" Mr. Ward and explain other people's published papers to him. In fact, in the Examiner's cited art, attention is directed to Mr. Cockeram who defended the Applicant, stated,

*"I really don't think it is Dr. Swartz's job to pick apart a paper for you".*

## **SOME ERRORS OF LAW DISCUSSED BY THE EXAMINER**

### == Error By Examiner Regarding Dash

42. The Examiner states:

*"The Board decision in Ex parte Dash, 27 USPO 2d 1481 is considered pertinent here."*

### **THE TRUTH - The Examiner Errs Because Significant Evidence Was Submitted**

The Examiner has a new argument regarding the Board of Patent Appeals and Interferences in the Dash decision. The Examiner claims the Dash decision says cold fusion does not exist. Then the examiner asserts -- without proving it -- that the Dash case is the same as the present instant case. However, there are several misstatements and logical errors in this new argument.

First, the decision states [Ex parte Dash No.92-3536 (Decided November 24, 1992 Released May 11, 1993)]: "applicants failed to produce any evidence to overcome examiner's position. .... " [U.S. PTO Board of Patent Appeals & Interferences; Ex parte Dash No. 92-3536 November 24, 1992] That is not the case here. More than three hundred references, the supplied Declarations, and the Applicant's published reports in peer-reviewed journals, overcome the Examiner's position, not just because of the quantity of references, but because of the quality. The Declarations alone overcome the Examiner's position if the Examiner actually obeyed the law and the Office's rules.

Second, the present invention is neither described by, nor referred to, within Dash, or said Appeal Decision. Dash is simply a different case despite the Office's new argument. As such, the use of the Dash decision is improper.

#### == Error By Examiner Regarding In re Chilowsky,

43. The Examiner inaccurately states:

*"The present case is considered analogous to that in In re Chilowsky ... wherein the court held the disclosure to be insufficient. In the present case (despite Applicant's arguments to the contrary), the examiner has shown that various necessary parameters have not been provided and, the examiner has provided evidence that the artisan does not know the requisite parameters of an operative cold fusion system, nor how to make and use an operative cold fusion system."*

#### THE TRUTH - The Examiner Errs By Ignoring The Original Specification

The Examiner is disingenuous. The amount of evidence required for proof of utility depends on the facts of each individual case [In re Gazave, 54 CCPA 1524, 379 F.2d 973, 154 USPQ 92 (1967); In re Chilowsky, 43 CCPA 775, 229 F.2d 457, 108 USPQ 321 (1956); In re Jolles, U.S.C.P.A., 1980, 628 F.2d 1322, 206 USPQ 885]. Applicant has provided the Office with those parameters, and previously in a case before the US Supreme Court, the Office was caught being dishonest about voltage, temperature, and other parameters. A copy of that is included with this response so that the Examiner and the Court if necessary can see that this disingenuity is systematic. Applicants data and sterling references consisting of scores of articles taken from peer-reviewed and other scientific and educational journals, all in rebuttal to the Office's misstatements. Appellant's references have been listed on Forms PTO-1449 with the appropriate Petition pursuant to 37 CFR 1.97(d)(1)(ii), and certificate pursuant to 37CFR 1.97(d)(1)(e), appended. Said references, like the submitted un rebutted Declarations are relevant and overcome the opinions of Examiner because of the reasons stated in said Appeal and Reply Briefs.

#### == Error By Examiner Regarding Italy - Court

44. The Examiner inaccurately states:

*"It is also noted that there has apparently been a court decision on cold fusion in Italy ... "*

#### THE TRUTH - The Examiner Errs And Cites A Libel Case

The cited case is irrelevant, immaterial, and was a libel case and did not involve the case for cold fusion, nor the case for the present invention.

## SUMMARY

45. It is commonsense that the individuals in the scientific community who actually attend the Conferences in cold fusion are the same ones who evaluate its products and publications. This community as defined by the rules of the Office and by commonsense -- if it will be applied in this case -- verify the existence of the field. Publications show that growing numbers of the scientific community consider the positive results of cold fusion as being confirmed. Where is the Examiner's comment on any one which proves the statements of the Examiner are disingenuous. Said publications continue to this day, including (and each of which show the Office's opinion is flawed):

Arapi, Alban, Faculty Of Engineering, Iwate University, Japan, Experimental Observation Of New Element Production In The Deuteride And/Or Hydride Palladium Electrodes Exposed To The Low Energy Dc Glow-Discharge, Cold Fusion Times, Volume 10, Number 1, 2003

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Chubb, Scott R. Talbot A. Chubb, Rsch Syst, Theoretical Framework For Anomalous Heat Without High-Energy Particles From Deuteron Fusion In Deuterium-Transition Metal Systems, Trans. American Nuclear Society, Low-Energy Nuclear Reactions (2003)

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Will, Fritz G., Krystyna Cedzynska, Denton C. Linton, Tritium Generation In Palladium Cathodes With High Deuterium Loading, Transactions Of Fusion Technology, Vol. 26, Number 4T, Part 2, December 1994: P. 209.

Where is the Examiner's response technically? Are all these people lying as the Examiner and Office purport? No.

In fact, such widespread replications of cold fusion, and other developments in the field, have more evidentiary value than the few flawed "negative" reports cited by the Examiner. The facts dispute the erroneous rejection of all pending claims made by the Examiner pursuant to 35 U.S.C. 112, first paragraph, based upon the Examiner's incorrect -- and unfounded given the supplied Declarations -- opinion that the "environment" in which the above-entitled invention operates "does not exist". In contrast to the few "nay-sayers" the Office cites, and in contrast to the "older" books, papers, and newspapers to which the Office refers in its new argument, stand the facts and the Declarations which demonstrate the existence of these reactions, and even their generation of nuclear fusion products (such as helium-4), and the operability of the present invention. The positive results, the Declarations, and the peer-reviewed published literature [including Swartz. M., 1994 "Catastrophic Active Medium Hypothesis of Cold Fusion", Vol. 4. "Proceedings: "Fourth International Conference on Cold Fusion", sponsored by EPRI and the Office of Naval Research] have much more evidentiary value than the few "negative" less credible -- recycled and older -- reports cited by the Examiner. Therefore, the subject matter sought to be patented as defined by the pending claims have operability, and resides in a field which does exist and have utility.

### EXAMINER'S ERRORS REGARDING CRITICAL FEATURES OF THE PRESENT INVENTION

46. The Examiner states again the following, ignoring the entire detailed comprehensive response of the Applicant and the original specification and claims:

*"...this "something additional", this critical feature, must be clearly specified so as to enable the artisan to make and use the invention as required by statute."*

#### **THE TRUTH - Critical Features Were Specified And Claimed And Discussed Previously**

The Examiner is disingenuous in the matter of a "critical feature" because the applicant has already diligently supplied information of several critical features which were taught in the original specification of the above-entitled application several times. These were fully discussed in the previous communication from the applicant to the Examiner, dated 12/3/02. The nature of the invention, along with introduction of some of the Declarations, was discussed in the previous communication from the Applicant to the Examiner, dated 12/3/02, on page is 11 and 12. The operability of this invention was discussed in the previous communication from the Applicant to the Examiner, dated 12/3/02, including on pages 57 though 85. The role of loading in the operability of this invention was discussed in the previous communication from the Applicant to

the Examiner, dated 12/3/02, on pages 57-58. The role of the optimal operating point in the operability of this invention was discussed in the previous communication from the Applicant to the Examiner, dated 12/3/02, on pages 59-60 and 66. The equations associated with the loading, and the catastrophic behavior of the loaded isotopic fuel, was discussed in the previous communication from the Applicant to the Examiner, dated 12/3/02, on pages 61 through 65, and 70-71. Applicant's extensive publications, and supporting publications, was discussed in the previous communication from the Applicant to the Examiner, dated 12/3/02, on pages 72-74.

Furthermore, it was again discussed by Applicant in the Communication of Applicant dated 5/5/03 including therein on pages 77-85.

Where is the Examiner's substantive response to most or all of this? The Examiner has ignored many of the Applicant's detailed Arguments.

**Where are the Examiner's responses to these submitted responses by the applicant?**

#### **TO REVIEW AND SUMMARIZE AGAIN:**

47. There are several differences including, without minimizing any of the others not cited:

- 1) Loading control through methods taught in the above-entitled application,
- 2) Control of Loading Flux,
- 3) Optimal Operating Points, and
- 4) Two stage catastrophic movement of loaded hydrogen within the metal

These were discussed in the application, in the cited other applications, the cited published papers, and further in the previous responses to the Examiner (which has been ignored in this respect to a serious degree perhaps inadvertently or unintentionally).

The two-stage nature of the present invention was discussed in the previous communication from the Applicant to the Examiner, dated 12/3/02, including on pages 67-68.

It was again discussed by Applicant in the Communication of Applicant dated 5/5/03 including therein on pages 77 through 85, and 89. Where is the Examiner's substantive response?

Where is the Examiner's substantive response?

## REQUISITE LOADING [ #1 IN PATTERNS OF FAILURE]

48. The Examiner states:

*"There is neither an adequate description not enabling disclosure of the parameters of a specific operative embodiment of the invention"*

*"There is neither an adequate description ... minimum concentration of the isotopic fuel in the cathode necessary for the desired reactions to take place, "*

### **THE TRUTH - Loading, The Critical Feature, Here Was Discussed Previously**

The role of loading in the operability of this invention was discussed in the previous communication from the Applicant to the Examiner, dated 12/3/02, on pages 57-58. Where is the Examiner's response to Figure 1 therein, also in Applicant's peer-reviewed publication, including Swartz. M., 1994 "Catastrophic Active Medium Hypothesis of Cold Fusion", Vol. 4. "Proceedings: "Fourth International Conference on Cold Fusion"? There is none. Instead, ignoring it, the Examiner inaccurately states there is no disclosure. However, this, and the isotope ratios in the metal and loading, were discussed in the original specification [S.N. 07/760,970, confer also Swartz (97C)], and in the referred to Applications (for example '457 on page 16, lines 11-14), and in reference to the peer-reviewed articles [Swartz (1992), Swartz (1993), Swartz (1994)].

The invention at issue in this case, generally speaking, uses a metal such as palladium which has the unique property of internally filling ("loading") with hydrogen, as a sponge fills with water. Loading of a material (palladium) with a hydrogen is neither unproven "theory" nor "incredible" as the Examiner falsely writes, but can be elicited using the teachings of Applicant's other specifications and claims, as cited. Applicant taught how to introduce fuel ["load"] as claimed. As Dr. Scott Chubb stated about the patent application of which this Application is a divisional, in his Amicus Brief,

*"...each deuterium nucleus (D) may effectively dissociate from its electron and freely flow through the metallic substrate ... these nuclei ... are free to move throughout a crystal lattice"*

Applicant has discussed loading in considerable detail in several cases before the Office, and these were even understood by the Federal Appellate Court. Applicant did refer to said applications and cases in the present application. Loading is discussed in each of the referred to patent applications of the Applicant, including '457 where it is discussed on page 16, lines 11-14. [Specifically, in the '970 application, Applicant taught about loading on pages OS 15-16, 19, 20, 21, 22, 24, 27, 28, and 34 in the original specification.] Applicant's loading technology, consistent with conventional physics, has been published in peer-reviewed journals [Swartz, M., Fusion Technology, 22, 2, 296-300, 1992; 26, 4T, 74-77, 1994; 32, 126-130, 1997;

Hagelstein, Swartz, MIT RLE Progress Report, 139: 1, 1-13 (1997); Swartz, Fusion Technology, 31, 228-236 (1997); ICCF-4, (1994); J.New Energy, 1,4,26 (1997); M.Swartz, 1992, "Quasi-One-Dimensional Model of Electrochemical Loading of Isotopic Fuel into a Metal", Fusion Technology, 22, 2, 296-300; Swartz, M., 1994, "Isotopic Fuel Loading Coupled To Reactions At An Electrode", Fusion Technology, 96, 4T, 74-77; "Codeposition Of Palladium And Deuterium", Fusion Technology, 32, 126-130 (1997); Swartz, 1994, "Generalized Isotopic Fuel Loading Equations", and "Cold Fusion Source Book", International Symposium On Cold Fusion And Advanced Energy Systems", Ed. H.Fox, Minsk, Belarus; Swartz, 1997]. These are proof and confirmation of Applicant's teachings and demonstrate and confirm enablement of those teachings, and relevant here, also demonstrates confirmation of the teachings taught years earlier in the original specification and claims of which the present application is a divisional. Furthermore, Figure 1 did show the increase in observed excess enthalpy (or heat, shown along vertical axis) from a palladium (Pd) electrode loaded with deuterons (D) from heavy water. Increased loading is towards the right hand side. Attention is directed not only to the fact that the desired reactions are zero below  $\sim 0.85$ .

### **Optimal Operating Points [ #2 IN PATTERNS OF FAILURE]**

The Examiner inaccurately purports that the description of means to "charge the palladium with deuterons" was inadequate, and that the specification (which does refer to other pending applications) was not unique. This notion is utterly incorrect for several reasons. Applicant cites his publications and other applications. In '457 Applicant taught "increasing through a series of at least three incremental steps the electric power drive conditions of said electrical circuit" on page 15, lines 15-20, and page 23, lines 14-17. Furthermore, in '457 and in the corresponding figures in Swartz(97), there are graphs of the output [Figure 6, labels 701, 702] and the V-I (voltage current) characteristics [Figure 5, labels 503, 510, 519, 520, 504, 521]. Many "negative" results the result of the failure to operate the system at the optimal operating point, as shown in Figure 2 from the Applicant's peer-reviewed published paper. Furthermore, in addition, to alleviate any possible additional problem which the Examiner might have, the Applicant has now amended this application to include again said references to said other applications, and to said peer-reviewed published papers.

In addition to loading, "optimal operating points" must be understood to successfully use LENR/CF systems. This graph shows the biphasic response of the products (heat, helium-4, tritium) of these systems to increasing input electrical driving power. The horizontal axis represents the electrical input power and is logarithmic. The nickel light water data is from Swartz; the palladium heavy water data are from Miles (USN) and Szpak (USN). The data reveal relatively narrow loci of optimal

operating points. Driving with electrical input power beyond the peaks (optimal operating points) does not help the production of the desired product but yields a falloff with increasing input power. Optimal operating points account for some of the widespread difficulties in observing these phenomena because of driving the systems inadvertently or unintentionally outside of the optimal operating point (Swartz. M., *Journal New Energy*, 4, 2, 218-228 (1999), Swartz. M., *Transactions of the American Nuclear Association*, Nashville, Tenn 1998 Meeting, (ISSN:0003-018X publisher LaGrange, Ill) 78, 84-85); Swartz. M., G. Verner, A. Frank, H. Fox, *Journal of New Energy*, 4, 2, 215-217 (1999); Swartz. M., 1997, *Fusion Technology*, 31, 63-74).

The nature of the invention, along with introduction of some of the Declarations, was discussed in the previous communication from the Applicant to the Examiner, dated 12/3/02, on page is 11 and 12. The role of the optimal operating point in the operability of this invention was discussed in the previous communication from the Applicant to the Examiner, dated 12/3/02, on pages 59-60 and 66.

Furthermore, it was again discussed by Applicant in the Communication of Applicant dated 5/5/03 including therein on pages 77 through 85. Where is the Examiner's substantive response?

Where is the Examiner's substantive response?

## TWO-STAGE CATASTROPHIC MOVEMENT OF LOADED HYDROGEN WITHIN THE METAL

The present invention is designed to enable the generation of a catastrophic desaturation. In the present case, the palladium is saturated, fully loaded, with isotopic fuel, and then the catastrophic condition is created. The office purports inadequate enablement of "catastrophic desaturation", and that it is indefinite. In fact, contradicting the Examiner, the applicant's peer-reviewed publications about catastrophic desaturation have been published by EPRI, the U.S. Navy, the American Nuclear Society. Applicant's publications have taught internal diffusion flux of isotopic fuel (hydrogen) as discussed in peer-reviewed journals [Hagelstein, Swartz, *Optics and Quantum Electronics*, *MIT RLE Progress Report*, 139: 1, 1-13 (1997); Swartz, 1997, "Phusons in Nuclear Reactions in Solids", *Fusion Technology*, 31, 228-236 (1997); Swartz, 1994, "Catastrophic Active Medium Hypothesis of Cold Fusion", 4, "Proceedings: "Fourth International Conference on Cold Fusion" sponsored by EPRI and the Office of Naval Research; Swartz, 1997, "Hydrogen Redistribution By Catastrophic Desorption In Select Transition Metals", *Journal of New Energy*, 1, 4, 26-33]. This is confirmation of Applicant's teachings of internal

diffusion isotopic fuel and interstitial barriers. Importantly, these teachings confirm operability as taught years earlier in the original specification and claims.

The Applicant notes that these papers --involving catastrophic desaturation-- underwent peer-review and were published. Furthermore, those who are skilled-in-the-art have agreed that said catastrophic desaturation is a critical issue for the successful performance of the system [Swartz (94B), Swartz (97B)]. The present invention is a divisional of S.N. 07/760,970 ("the '970 application"), a two-stage method to control loading. In the original disclosure of which the present application is a divisional, catastrophic desaturation was presented in several figures and discussed, including the use of pressure, temperature, or other means to generate said catastrophic desaturation. Applicant taught about generating movements of isotopic fuel in the loaded metal ["flux"] on pages OS 15-16, 19, 20, 21,22, 24, 27, 28, and 34 in the original specification of which this present application is a divisional.

**"The fusion reaction is driven by the catastrophic fractional desaturation of deuterons from the crystalline palladium lattice, previously filled to capacity."**

[07/760,970; Original Specification, page 21-22]

S.N.07/760,970 [now as Continuation in this application] involves a two-stage process involving loading of hydrogen into a metal electrode such as palladium. Applicant taught using a first stage of electrode loading, followed by, a second stage of sudden rapid ("catastrophic") flow of the loaded hydrogen within the metal. Applicant taught in the original specification and claims how this apparatus works and presented objective detailed evidence of the invention. The first stage is the electrode loading, and then, in the second stage a rapid ("catastrophic") flow of hydrogen results within the metal. After the initial loading, said flow (or flux) of hydrogen takes place (pages 15-16,19-22,28,33-34; S.N.07/760,970) until the previously-loaded palladium is spent of its deuterons or the material is otherwise damaged.

The two-stage nature of the present invention was discussed in the previous communication from the Applicant to the Examiner, dated 12/3/02, including on pages 67-68. Where is the Examiner's substantive response? The Examiner has ignored many of the Applicant's detailed Arguments.

49. The Examiner states,

*Accordingly, all of the issues set forth in said previous Office action regarding lack of enablement are still pertinent in determining the patentability of Applicant's claims. Specifically, the following items were not addressed in the applicant's amendment are now repeated (in bold letters):*

**THE TRUTH - The Examiner Is Disingenuous**

The Examiner has made a deliberate false statement. The Applicant respectfully requests and reason for this vast departure from the normal standards of review. Much of the following was previously discussed in the recent communication from the applicant to the examiner, dated 12/3/02. There was a certificate of mailing on page 95 therein. The equations associated with the loading, and the catastrophic behavior of the loaded isotopic fuel, was discussed in the previous communication from the Applicant to the Examiner, dated 12/3/02, on pages 61 through 65, and 70-71. The material was in the original specification and claims, is known to those skilled-in-the-art, and was addressed previously. Where is the Examiner's substantive response?

Furthermore, it was again discussed by Applicant in the Communication of Applicant dated 5/5/03 including therein on pages 77 through 101. Where is the Examiner's substantive response?

The Examiner has again elected to ignore many of the Applicant's detailed Arguments.

50. The Examiner states again, ignoring the entire response and original specification of the Applicant.

*"There is neither a written description nor an enabling disclosure as to how and in what manner so-called "distribution" is achieved."*

**THE TRUTH - Critical Features Were Specified And Claimed And Discussed Previously**

The Examiner is disingenuous. These were described in the original specification through the use of an applied electric field intensity. As fully taught in the disclosure, and the patents which are referred to, the power source generates the applied electric field intensity. The induced drift by the applied electric field is shown schematically in the figure which does not mean that the deuterons travel in such a simple fashion. The electric field distribution is altered as the solution and system each respond with complex conduction and polarization phenomena. Ionic drift, secondary space charge polarization, propagation of solvated deuterons, deuterons in clathrates, and L-D-deuteron defects with their ferroelectric inscription in the heavy water, and the formation low dielectric constant bubbles abutting the cathode are the minimum expected. The double layer between the solution and the metal is created both by the cathode fall of ions and other polarization reactions. The mechanisms of dielectric

polarization and conduction have been cited in the submitted applications by the applicant which are referred to in the present application. If any are omitted they are now added to this disclosure, to supplement the others. The Examiner is again referred to the following on electrochemistry and continuum electrodynamics, sine qua non to those skilled in the art [Uhlig, H.H., "Corrosion and Corrosion Control", Wiley (1971), Bockris, J., K.N. Reddy, "Modern Electrochemistry", Plenum Press (1970), Von Hippel, A. "Dielectric Materials and Applications", MIT Press, (1954); Von Hippel, A., D.B. Knoll, W.B. Westphal, "Transfer Of Protons Through 'Pure' ICE Ih Single Crystals", J. Chem. Phys., 54, 134, (also 145), (1971), Melcher, J.R., "Continuum Electromechanics", MIT Press, Cambridge, (1981), also "Electromechanical Dynamics", Part III, Elastic and Fluid Media, H. Woodson, J. Melcher, J. Wiley & Sons, Inc., NY (1968)].

51. The Examiner states,

*"On page 11, lines 9+, an equation is given for the spatial distribution of deuterons,  $D^+(z)$ . However, there is neither an adequate description nor enabling disclosure of how in what manner this distribution was derived from the molecular flux,  $F(D^+)$ . . . The disclosure is insufficient as to which parameters on the right hand side of the  $D^+(z)$  equation are spatially dependent."*

#### **THE TRUTH - Equations Were Discussed**

The Examiner has made a deliberate -- repeated -- false statement. The equations associated with the loading, and the catastrophic behavior of the loaded isotopic fuel, was discussed in the previous communication from the Applicant to the Examiner, dated 12/3/02, on pages 61 through 65, and 70-71.

This was again discussed by Applicant in the Communication of Applicant dated 5/5/03 including therein on pages 77 through 85. Where is the Examiner's substantive response?

The Applicant has explained this before to the Examiner, and his disingenuous comment is made in the face an adequate description and an enabling disclosure of how the distribution is derived by an applied electric field. Furthermore, this is well known to those skilled in the art, and in addition, the applicant gave the Examiner references.

The applicant did state what terms on the right hand side are spatially dependent. Furthermore, is another example where the Examiner remains vicious in his attack against the applicant, rather than complying with the standards of review.

The parameters which the Examiner is having trouble understanding are well known in the field.

Those skilled in the art understand that the applied electric field influences the spatial distribution of deuterons in aqueous solution. Without significant convection, the flux ( $J_i$ ) of any  $i$ th species (here deuterons) results from diffusion down concentration gradients and electrophoretic drift.

$$J_D = -B_D * \frac{d[D(z,t)]}{dz} - \mu_D * [D(z,t)] * \frac{d\Phi}{dz} \quad (\text{eq.1})$$

For additional background, the Office is referred to Swartz, M., "Quasi-One-Dimensional Model Of Electrochemical Loading Of Isotopic Fuel Into A Metal", Fusion Technology, 296-300 (1992) Swartz, M., "Isotopic Fuel Loading Coupled To Reactions At An Electrode", ICCF-4 (1993); Swartz 97C, 97B. These equations are complex because they include the differential isotope diffusivity, electrophoretic mobility, solubilities and the range of susceptibilities of the materials and products involved, which have parameters and vary with temperature. Applicant's writings, including the original specifications filed with the Patent Office go on with how the results of the mathematical expression concerning the deuteron flux into palladium relates to the applied electric field intensity.

The equation is the first of the quasi-1-dimensional model of loading which offers insight into the processes because it indicates how both competitive gas evolving reactions at the metal electrode surface and the ratio of the applied electric field energy to thermal energy [ $k_B * T$ ] are decisive in controlling the loading of the metal by the deuterium.

The equation can be examined for its relation to thermal processes by substitution using additional non-dimensional parameters and the Einstein relation.

$$\frac{B_D}{\mu_D} = \frac{k_B * T}{q} \quad (\text{eq.2})$$

Coupled equations thus determine the distribution of deuteron species in the bulk solution. The mathematical solutions are determined both by the boundary conditions and by conservation of mass. The Q1D model indicates that the deuteron loading rate into the electrode is critically linked to gas evolution and is also first order on  $\mu_D * E$ . This loading rate equation (equation 3) relates deuteron availability (secondary to the applied electric field) to the losses of deuterons to both gas evolution and the fusion reactions.

$$K_e = (\mu_D * E) - (K_g + K_{fus}) \quad (\text{equation 3})$$

One simple but important corollary is that the evolution of D<sub>2</sub> gas and deuteron loading to the palladium cathode are mutually exclusive for any given applied electric field. Another important corollary is that this NOT ELECTROLYSIS. As Applicant taught in Swartz(92), and Swartz (89), electrolysis is the opposite of what is desired. This is yet another difference from all other cited art.

### SUMMARY:

52. The correct dimensional analysis begins with the equation describing the quasi-1-dimensional model of loading. This offers insight into the processes because it indicates how both competitive gas evolving reactions at the metal electrode surface and the ratio of the applied electric field energy to thermal energy [ $k_B \cdot T$ ] are decisive in controlling the loading of the metal by the deuterium. As Applicant taught, the loading flux [of the isotope of hydrogen into the cathode], must be distinguished both from the gas evolving flux, and even from the total current, as well ( Swartz 1992).

"The three additional components of deuteron flux must be considered. The first is the entry of deuterons into the bulk of palladium which constituted the cathode. That flux is described as  $J_e$ , the rate at which deuterons physically enter the palladium cathode. The second deuteron flux is that component lost at the cathode to gas evolution ... ( $J_g$ )...  $J_f$  is the the flux of deuterons lost to fusion."

[Swartz, M., Quasi-One-Dimensional Model Of Electrochemical Loading Of Isotopic Fuel Into A Metal, *Fusion Technology*, 296-300 (1992)]

The loading flux [of the isotope of hydrogen into the bulk volume of the palladium cathode] is fundamental to the entire understanding of these phenomena, and it was explicitly taught in the original specification. The loading flux must also be distinguished both from the gas evolving flux, and even from the total current, as well.

53. The Examiner states,

*"The disclosure is insufficient as to what exactly are the approximations made to arrive at  $D^+(z)$ , in addition to the disclosed approximation of no free charge density."*

**THE TRUTH - A Physicist would not ask this non-scientific question**

The Examiner has made another deliberate false statement. Given this, and the Examiner's purporting that voltages yield magnetic fields (vide infra), there is heralded the Examiner's lack of knowledge of physics by claiming that there is free charge density. To those in the field of electric physics, electrical engineering, and physics,

the Examiner statements are false. Furthermore the applicant to explicitly made statements as to what the approximations were. The Examiner is disingenuous again, because his comment is falsely made in the face of this material in the original specification, and the papers referred to therein.

54. The Examiner states,

*"For example, The disclosure is insufficient as to how and what losses, if any, are exactly accounted for in the equations (e.g., loss due to deuteron gas evolution from the bulk solution)."*

**THE TRUTH - The Examiner Is Disingenuous**

The Examiner has made another deliberate false statement. This disingenuous comment is made in the face of a full description of the terms in the equation involved with gas evolution. Furthermore the Examiner was led to the applicant's peer reviewed published paper in Fusion Technology. The equations associated with the loading were discussed in the previous communication from the Applicant to the Examiner, dated 12/3/02, on pages 61 through 65, and 70-71. [also from page 57 to the cited pages].

Furthermore, it was again discussed by Applicant in the Communication of Applicant dated 5/5/03 including therein on page 89. Where is the Examiner's substantive response?

**The Board should ask: Where is the Examiner's substantive response?**

**The Examiner has ignored many of the Applicant's detailed Arguments and then merely repeated the questions - over and over.**

Even if the applicant did not explicitly state what the terms are, and the applicant did, this is well known to those skilled in the art, and in addition, the applicant gave the Examiner references. The loading flux [of the isotope of hydrogen into the bulk volume of the palladium cathode] is fundamental to the entire understanding of these phenomena, and it was explicitly taught in the original specification. The loading flux must also be distinguished both from the gas evolving flux, and even from the total current, as well. For additional background, the Office is referred to Swartz, M., "Quasi-One-Dimensional Model Of Electrochemical Loading Of Isotopic Fuel Into A Metal", Fusion Technology, 296-300 (1992) Swartz, M., "Isotopic Fuel Loading Coupled To Reactions At An Electrode", ICCF-4 (1993); Swartz 97C, 97B. These equations are complex because they include the differential isotope diffusivity, electrophoretic mobility, solubilities and the range of susceptibilities of the materials and products involved, which have parameters and vary with temperature. Applicants writings, including the original specifications filed with the Patent Office go on with

how the results of the mathematical expression concerning the deuteron flux into palladium relates to the applied electric field intensity.

55. The Examiner states,

*"On page 16, lines 6+, the applicant discloses an equation for the deuterium partial pressure, PD2. However, the disclosure is insufficient as to what exactly are the terms a and "n"."*

*"On page 18, lines 12+, the applicant discloses an equation for the fractional saturation, YD. However, the disclosure is insufficient as to what exactly is the term C1."*

#### **THE TRUTH - Terms Understood by Those Skilled-in-the-Art**

With all due respect, these terms were discussed. Background from the Examiner on fugacity against includes Uhlig, H.H., "Corrosion and Corrosion Control", Wiley (1971) and Bockris, O'm, J., K.N. Reddy, "Modern Electrochemistry", Plenum Press (1970), especially Bockris. Again, the Examiner is incorrect because pressure range is discussed in the original specification of '970, and in the referred-to Application ('457) with reference to number 132 in Figure 3, on page 17, lines 18-22, therein, and in the other peer-reviewed publications cited above. C1 is a constant of proportionality, as discussed in the original specification.

56. The Examiner states:

*"There is neither an adequate description ... surface area-to-volume requirement for the reactor"*

#### **THE TRUTH - The Examiner Leads Away From This Invention**

The Examiner inaccurately states there is no disclosure of "surface area-to-volume requirement for the reactor". However, this is inaccurate because the relevant issues of temperature, mass, and thermal capacity, fraction saturation, etc. which were discussed in the original specification. If the Examiner feels that his notion defeats conventional electrophysics and solid state physics and nuclear physics, then perhaps he should state with specificity his question and the reason for it, rather than just "brick-toss" words which are not consistent with electrical engineering practice.

57. The Examiner states:

*"There is neither an adequate description ... the exact composition (including impurities and amounts thereof) of the electrolyte and of the cathode and of the anode"*

*"There is neither an adequate description ... atomic or weight ratio of metal electrodes to electrolyte (e.g. palladium to gel)"*

#### **THE TRUTH - Composition Was Discussed Previously**

The issues of gel were addressed in another and were answered before in the previous communication. Where is the Examiner's response to Applicant's description of composition of electrodes and solution? Swartz (07/339,976; filed April 18, 1989, a

specification pending before the Patent Office) and Swartz (07/371,937; filed June 27, 1989, specifications pending before the Patent Office, now as a Continuation) taught codeposition of palladium salts.

"the combination of palladium salts ... and the means to cathodically codeposit said materials directly onto a cathode.

[Swartz; US 07/39,976; April 18, 1989]

The parent of the above-entitled application goes even further and teaches the use of gels and other strategically configured systems, and the present application discusses the advantages of a dissolving palladium anode.

The issue of loading is known to those with a science education in the United States. Most importantly, the isotope ratios in the metal and loading, were discussed in the original specification [S.N. 07/760,970, continued as S.N. 09/750,765; confer also Swartz (97C)], and in the referred to Applications (for example '457 on page 16, lines 11-14), and in reference to the peer-reviewed articles [Swartz (1992), Swartz (1993), Swartz (1994)].

This was again discussed by Applicant in the Communication of Applicant dated 5/5/03 including therein on page 87. Where is the Examiner's substantive response?

58. The Examiner states:

*"There is neither an adequate description ... voltage and current requirements to produce the magnetic field"*

**THE TRUTH - "Voltage ... To Produce Magnetic Field" Heralds Examiner's Lack Of A Serious Physics Education**

The Examiner asks for the "voltage .. requirements to produce the magnetic field". No one who says this was a deserved graduate of any qualified science or engineering institution. Any individual from a 7 year old seeking an amateur radio license, to any high school graduate, to certainly any engineer or physicist, would KNOW Ampere's Law. The line integral of the magnetic field intensity around a line electrical current is related to that current. Not voltage. The Examiner's statement finally reveals him to have no interest in the Applicant's invention, but only to savage and harass the Applicant with non-scientific chatter. The Applicant hereby requests from the Examiner --or the Commissioner for Patent-- to explain the above statement by the Examiner. The Applicant --and truth, justice and the American way-- challenge the Office, Examiner and Commissioner, to name some inventions in the Office's history which violate Ampere's law. Applicant, who has four electrical engineering degrees from MIT (BS, MS, EE '71) and ScD '84 requests that the Examiner and Commissioner explain the latest demand and demonstrate a basis for physics and science competence by the Examiner and his supervisors.

Furthermore, this AGAIN PROVES that the Examiner has no interest in the Applicant's invention..

Finally, this was again discussed by Applicant in the Communication of Applicant dated 5/5/03 including therein on page 88. Where is the Examiner's substantive response?

59. The Examiner states:

*"These impurities can have an adverse effect on the desired operation of the invention."*

**THE TRUTH - Examiner's Systematic Fixation On Contamination Suggests Psychopathology**

Contamination was discussed in the previous communication from the applicant to the examiner, dated 12/3/02 and in many of the other applications, including '457. The Examiner should read the books which the Applicant suggested previously regarding this because they are well-known to those familiar with the state-of-the-art. The applied electric field is direct to move cations (i.e.  $\text{Pd}^{++}$ ) to the cathode where it plates out. The Examiner was referred to the following on electrochemistry and continuum electrodynamics, *sine qua non* to those skilled in the art [Uhlig, H.H., "Corrosion and Corrosion Control", Wiley (1971), Bockris, J., K.N. Reddy, "Modern Electrochemistry", Plenum Press (1970), Von Hippel, A. "Dielectric Materials and Applications", MIT Press, (1954); Von Hippel, A., D.B. Knoll, W.B. Westphal, "Transfer Of Protons Through 'Pure' Ice Ih Single Crystals", J. Chem. Phys., 54, 134, (also 145), (1971), and Melcher, J.R., "Continuum Electromechanics", MIT Press, Cambridge, (1981).

60. The Examiner states:

*"In the current application the Applicant does not define the products of the claimed process and apparatus....the only possible "products" that can be formed in the claimed invention are nuclear fusion products."*

*"The generation of excess heat has been known in the art as "cold fusion". Clearly, the "products of the current claimed invention must be the same as the product of "cold fusion"."*

**THE TRUTH - Products Including Loading, Heat and Helium-4 ARE Defined**

This was discussed in the previous Communication of 12/3/02 with the Examiner on page 69. Where is the Examiner's response? Furthermore, it was again discussed by Applicant in the Communication of Applicant dated 5/5/03 including therein on pages 77-88. Where is the Examiner's substantive response?

Instead, the Examiner, inadvertently or unintentionally appears to just ask the same question. It is unfair for the Examiner to change "loading" to "cold fusion" and it is unfair for the Examiner to change "heat" to "excess heat", but that is consistent with the Office's systematic attempt to usurp the Applicant's Constitutional and civil rights.

With all due respect to the Examiner's comments, the original specification of the above entitled application did in fact cite heat as a product of the desired reactions. The present application concerns loading, and is generally speaking a two-stage process involving loading of hydrogen into a metal electrode such as palladium, including a first stage of electrode loading, followed by, a second stage of sudden rapid ('catastrophic') flow of the loaded hydrogen within the metal and means to extract product using magnetic field inhomogeneity, based differential magnetic susceptibilities. Heat is discussed as a product. In contrast, neutrons were not discussed because their production is vanishingly small, to the degree that exists at all for reasons discussed in the Applicant's published paper [Swartz, 1997, "Phusons in Nuclear Reactions in Solids", *Fusion Technology*, 31, 228-236 (1997)].

61. The Examiner states,

*On page 25, lines 7+, the applicant discloses a cluster of seven CAM devices that is supported and thermally coupled by epoxy. However, there is neither an adequate description nor enabling disclosure of how and in what manner epoxy can so maintain the devices in a stacked configuration (i.e., not fall apart), especially during the period when the alleged astronomical pressures are developed.*

**THE TRUTH - The Examiner Discusses Fugacity Which Was Discussed And Ignored By The Examiner**

The Examiner has made another deliberate false statement. This was discussed in the previous Communication with the Examiner on page 71. Where is the Examiner's response? With all due respect, fugacity is a calculated pressure within an electrochemically used electrode. Background from the Examiner on fugacity against includes Uhlig, H.H., "Corrosion and Corrosion Control", Wiley (1971) and Bockris, O'm, J., K.N. Reddy, "Modern Electrochemistry", Plenum Press (1970), especially Bockris. Again, the Examiner is incorrect because pressure range is discussed in the original specification of '970.

62. The Examiner states,

*On page 32, lines 4+, the applicant discloses that the products are removed at the product barrier. However, there is neither an adequate description nor enabling disclosure of how and in what manner said products are so removed.*

**THE TRUTH - The Description using an Inhomogeneous Magnetic Field WAS Given**

The Examiner has made another deliberate false statement. As specified in the original disclosure: The pumping action upon products [other than heat] is from the action of an applied force exerted upon said product (in this case an isotope of hydrogen: tritium). The generation, and calculation, of the force induced by an

applied magnetic field intensity upon the desired isotope which is generated within the CAM reactor, is derived as follows.

**"An inhomogenous magnetic field intensity is applied by coil labelled 300 to one portion of the cathode (1). Said magnetic field is driven by the power supply (labelled 301) in the figure. The spatially inhomogenous magnetic field could also be created by a superconductor."**

[07/760,970; the present application in Continuation; Underline added for emphasis]

Ampere's Law is used to calculate the line integral of the magnetic field intensity around the applied electric current. That magnetic field intensity exists mainly in the gap between the high permeability rod (around which the coil has been wound) and includes the volumes encompassing the desired isotope [cf. Figure 18 of the original specification].

**"The differential magnetic susceptibility between isotopic fuel and the nuclear fusion product is used to magnetically pump the product to and through the barrier labelled 350. At that location there is a buildup of the isotope with the larger magnetic susceptibility due to said differential magnetic susceptibility."**

[07/760,970; the present application in Continuation]

63. The magnetic field intensity can be derived by inspection in the gap region based upon Gauss' Law, which implies that the divergence of the magnetic flux density is zero. Therefore, the use of a volume with one surface abutting the volume containing the desired isotope and the other surface abutting the end of said rod, results in a ratio between the two magnetic fields.

The magnetic field as taught in the above-entitled application is spatially inhomogeneous. The original specification and claims of the present invention also taught and claimed a separation system to extract an precise product - another feature of great utility.

A magnetic field inhomogeneity, based upon the differential magnetic susceptibilities [cf. Swartz and Declarations; A10-A21], creates forces which make this a

**"non-linear device in the sense that the containment field distribution is spatially non-uniform. ... the ... invention is therefore a chemical collection device."**

[Straus Declaration 1994]

64. The magnetic force, resulting from the applied magnetic field, is the spatial derivative of the magnetic coenergy with respect to distance.

"The magnetic force resulting from the applied magnetic field is the derivative of the magnetic coenergy with respect to distance in the axial direction, and is proportional to the square of the current, the square of the number of turns in the coil (300), and said differential magnetic susceptibility. The products are removed at the product barrier (labelled 350). If said isotopic product is of lower magnetic susceptibility, then the coil is moved toward the portion of the cathode near to the solution (6)."

[07/760,970; the present application in Continuation]

As an alternative means of calculating the applied magnetic force upon the desired isotope is to use the Maxwell Stress Tensor. The Maxwell Stress Tensor is based upon the orthogonal, and parallel, components of the magnetic field intensity over the surface of the desired isotope. The stress tensor is quite complex. The calculated force is based upon the spatial divergence of the stress tensor. Both methods of deriving the magnetic force are identical

65. These solutions are extremely complex but an introduction to this physics in a far simpler system [as regards ferrofluids and not the more complicated invention and products of the above-entitled application] is available in "*Electromechanical Dynamics*", Part III, Elastic and Fluid Media, H. Woodson, J. Melcher, J. Wiley & Sons, Inc., NY (1968), pages 772 to 777 [cf. figures 12.2.21 and 12.2.24].

The important result, as stated in the original specification, is that energy of the entire system decreases by the movement of the higher susceptibility isotopes towards, and into, the region containing the greatest magnetic field intensity.

The Examiner ignores *In re Brana* and *In re Eltgroth*, 419 F.2d 918, 164 USPQ 221 (CCPA 1970) which demand that the Examiner must establish a reason to doubt an invention's asserted utility, and the loading of an isotopic fuel into a material by an applied electric field, using a two-stage process involving loading of hydrogen into a metal electrode such as palladium, including a first stage of electrode loading, followed by, a second stage of sudden rapid ('catastrophic') flow of the loaded hydrogen within the metal and means to extract product using magnetic field inhomogeneity, based differential magnetic susceptibilities [cf. Swartz and Straus Declarations] is not 'incredible' or 'unbelievable' like the Examiner appears to purport. This invention is quite believable.

66. The Examiner states:

*"There is neither an adequate description ... dimensional ratio of electrodes to their spacing size"*

*"There is neither an adequate description ... sizes of anode and cathode relative to the space between them)"*

*"There is neither an adequate description nor enabling disclosure of how and in what manner the said three devices are so held in place by clips. Also, there is neither an adequate description nor enabling disclosure of how and in what manner the said three devices can be inserted into the receptor apparatus while they are clipped to the board. The applicant also states that some clips are electrically conductive and some are insulators. The disclosure is insufficient as to which components exactly receive the conductive clips and which components get the insulator."*

#### **THE TRUTH - REFERS TO DIFFERENT APPLICATIONS '691 and '381**

In fact, in case number 07/760,970, of which the present case is a divisional application, several methods are specified for removing said heat. In S.N. 09/579,381 which is another divisional, taught is a method for integrating three (or more) reactors into a power and product grid with means to extract product, including heat, through the socket, and with means for using electrical and thermal connectors held in a mechanical connecting system, means including clips and sockets, means to allows replacement and coupling to the control system, means using conductive and insulating clips, means to extract the heat from the reactor, means including heat pipes, diamond, or composites of diamond in thermally conductive epoxy filled with diamonds, means including a heat dissipative radiator, and means including separation of the anodes and anodic connectors from the cathodes and cathodic connectors. Simply put, '381 is an improvement for heat removal and integration of smaller units into larger assemblies. In the preferred embodiment, the apparatus described by the present application is a device shaped like a fuse and can be easily placed into, or removed from, an assembly. The damage or rundown of one unit "is thus easily exchangeable by replacement with a functioning one", which is re-inserted, as taught in the above-entitled application, into mechanical restraining, electrical, and thermal connectors (labelled 94, 96, and 97) and further restrained with clips (labelled 92). The clips that can be used in these devices capable of integrating reactors involving a material loaded with hydrogen are well known to those who work in the art with the exception of the fact that in the present application there is the novel and nonobvious method of having product transfer taken place to the socket itself. '381 involves product transfer through the socket itself. Thus, '381 teaches a method for integrating three (or more) reactors into a power and heat grid with means to extract product, with means for using electrical and thermal connectors held in a mechanical connecting system, means including clips and sockets, means to allows replacement and coupling to the control system, means using conductive and insulating clips, means to extract the heat from the reactor through the socket, means including heat pipes, diamond, or

composites of diamond in thermally conductive epoxy filled with diamonds, means including a heat dissipative radiator, and means including separation of the anodes and anodic connectors from the cathodes and cathodic connectors.

### **SUMMARY OF EXAMINER'S DEVIATIONS FROM THE STANDARDS OF REVIEW**

67. Where is the Examiner's response to the fact that Applicant has elected to submit his theories (and experimental work) before peer review in fusion technology run by the American Nuclear Society in hot fusion community since 1992. These, they surmounted peer-review and were published, and cited to the Office to explain the observed cold fusion phenomena, and published with other demonstrations of this field (including Hagelstein 1993A, 94; Takahashi 91, Swartz 1992, 94A, 96B, 97A, 97B; McNally 89; Hora 93; Johnson 94; Mills 94; Mills 95; Li 95; Kim 90, 94A, 94B, 95, 96; Matsumoto 89; Chubb 90, 91, 94A, 94B; Szpak 91; Tajima (90); Schneider 89; Rice 90, Zhu 90, and Bush 91A). Where does the Office offer a single equation, graph, or serious theory to dispute anything in the above entitled original specification and claims? Nowhere.

Where is the Examiner's response to the Optimal Operating Points which the Applicant has taught? Where is the Examiner's response to Figure 2 from Applicant's peer-reviewed publication presented in the last communication to the Examiner? There is none. Instead, ignoring it, the Examiner inaccurately states there is no disclosure. However, "optimal operating points" must be understood to successfully use LENR/CF systems. Many "negative" results the result of the failure to operate the system at the optimal operating point. Figure 2 showed the biphasic response of the products (heat, helium-4, tritium) of these systems to increasing input electrical driving power. The horizontal axis represents the electrical input power and is logarithmic. The nickel light water data is from Swartz; the palladium heavy water data are from Miles (USN) and Szpak (USN). The data reveal relatively narrow loci of optimal operating points. Driving with electrical input power beyond the peaks (optimal operating points) does not help the production of the desired product but yields a falloff with increasing input power. Optimal operating points account for some of the widespread difficulties in observing these phenomena because of driving the systems inadvertently or unintentionally outside of the optimal operating point (Swartz. M., Journal New Energy, 4, 2, 218-228 (1999), Swartz. M., Transactions of the American Nuclear Association, Nashville, Tenn 1998 Meeting, (ISSN:0003-018X publisher LaGrange, Ill) 78, 84-85); Swartz. M., G. Verner, A. Frank, H. Fox, Journal of New Energy, 4, 2, 215-217 (1999); Swartz. M., 1997, Fusion Technology, 31, 63-74). Applicant cites his publications and other applications. In '457 Applicant taught

"increasing through a series of at least three incremental steps the electric power drive conditions of said electrical circuit" on page 15, lines 15-20, and page 23, lines 14-17. Furthermore, in '457 and in the corresponding figures in Swartz(97), there are graphs of the output [Figure 6, labels 701, 702] and the V-I (voltage current) characteristics [Figure 5, labels 503, 510, 519, 520, 504, 521].

Where is the Examiner's response to Applicant's description of barriers which are used to strategically inhibit the flow of isotopic fuel. They are not in the cited patents and art? There is none. As taught in the original specification, Applicant has described barriers which are used to strategically inhibit the flow of isotopic fuel (deuterons in palladium by boron, or protons in nickel by gold) (confer Appendix C which is in the file record, and included here again for reference, and the other cited references including the published peer-reviewed publication Swartz, 1998, Improved Electrolytic Reactor Performance Using  $\pi$ -Notch System Operation and Gold Anodes, Transactions of the American Nuclear Association, Nashville, Tenn 1998 Meeting, (ISSN:0003-018X publisher LaGrange, Ill) 78, 84-85; Swartz, 1997, "Biphasic Behavior in Thermal Electrolytic Generators Using Nickel Cathodes", IECEC 1997 Proceedings, #97009; Swartz, 1998. The breadth of this subject requires an Appendix which was attached hereto and has been part of the file record of the '970. This introduction to the subject delineates many different barriers which can be divided into classes based upon characteristics discussed therein. There are a spectrum of "barriers" in this field. Some are structural, some are diffusive, some enable electrophoresis, some dielectrophoresis and its magnetic equivalent. Many are fully specified in the present inventions's original disclosure, many novel and unobvious from prior art. The full charging is discussed in detail in the referred to peer-reviewed publications including Swartz (92), Swartz (94), Swartz (97A), Swartz (98A), and Swartz (98B).

## LAW

68. These peer-reviewed publications, Exhibits and Declarations prove Applicant was correct on the filing date of the application [In re Hogan, 559 F.2d 595, 60S, 194 USPQ 527, 537 (CCPA 1977)]. They prove that the Applicant taught the subject matter defined by each of the rejected Claims including how his apparatus and method works, set forth the best mode contemplated, distinctly pointed out and claimed the subject matter which constitutes the invention, wrote an adequate enabling disclosure, and thus complied and conformed with 35U.S.C. §112, first paragraph, of the Patent Act. This was done so that an artisan, or those skilled in the art, could practice it without undue experimentation [In re Wands, 858 F.2d 731, 737, 8 USPQ2d 1400, 1404 (Fed. Cir. 1988), citing with approval Ex parte Forman, 230 USPQ 546, 547 (Bd. Pat. App. & Int. 1986)]. Applicant has now demonstrated that his invention as claimed was, and is, adequately described to one skilled-in-the-art. Said Declarations are sufficient in their factual content with respect to the significant evidence, and prove that the Examiner is in clear error. By submitting said peer-reviewed publications, showing the Applicant is correct, and said Declarations containing relevant facts by probative witnesses, the Applicant has now undertaken the full burden coming forward with his evidence as required [In re Oetiker, 977 F.2d at 1445, 24 USPQ2d at 1444].

Ignored (along with the evidence) yet again in the Examiner's Communication are the following standards of review. These were cited previously and no reason has been given by the Examiner for his deviation from said standards of review.

The Examiner ignores In re Prater, 415 F.2d 1393, 162 USPQ 541 (CCPA 1969)] which requires the Examiner to refer to the claimed invention as the focus of its Office communication, but it did not when drifting toward criticism of "FP".

The Examiner ignores In re Morris which requires that the Examiner must respond to what Applicant meant, but he did not.

The Examiner ignores In re Hogan [559 F.2d 595, 60S, 194 USPQ 527, 537 (CCPA 1977)] which discusses that enablement must be judged on the original specification and claims, but in this Communication it was not.

The Examiner ignores In re Fouche [439 F.2d 1237, 1243, 169 USPQ 429, 434, (CCPA 1971) and In re Zletz [893 F.2d 319, 13 USPQ2d 1320 (Fed. Cir. 1989)] which state that an invention (in structure, operation and composition) is defined by the claims and the original specification.

The Examiner ignores *In re Gazave*, 54 CCPA 1524, 379 F.2d 973, 154 USPQ 92 (1967)] and *In re Chilowsky* [43 CCPA 775, 229 F.2d 457, 108 USPQ 321 (1956)] which require consideration of the material which Applicant supplied and cited.

The Examiner ignores *In re Oetiker*, 977 F.2d at 1445, 24 USPQ2d at 1444 which requires the Examiner to substantively respond with a *prima facie* case of unpatentability. However, after the submission of Swartz, 1998, Improved Electrolytic Reactor Performance Using  $\pi$ -Notch System Operation and Gold Anodes, Transactions of the American Nuclear Society, Nashville, Tenn 1998 Meeting, (ISSN:0003-018X publisher LaGrange, Ill) 78, 84-85 and Swartz(97), other peer-review papers, and the Declarations, the burden shifts back to the Office and can only be discharged by the Examiner "presenting evidence or reasons why persons skilled-in-the-art would not recognize in the disclosure a description of the invention defined by the claims" [Wertheim, 541 F.2d at 263, 191 USPQ at 97]. Applicant asks that this be done with specificity, substantivity, and with explicit reference, and in detail with full findings of fact.

The Examiner ignores *In re Brana* and *In re Eltgroth*, 419 F.2d 918, 164 USPQ 221 (CCPA 1970) which demand that the Examiner must establish a reason to doubt an invention's asserted utility, and the loading of an isotopic fuel into a material by an applied electric field, using a two-stage process involving loading of hydrogen into a metal electrode such as palladium, including a first stage of electrode loading, followed by, a second stage of sudden rapid ('catastrophic') flow of the loaded hydrogen within the metal and means to extract product using magnetic field inhomogeneity, based differential magnetic susceptibilities [cf. Swartz and Straus Declarations] is not 'incredible' or 'unbelievable' like the Examiner appears to purport. This invention is quite believable.

The Examiner ignores *In re Vaack* [947 F.2d 488, 495-96, 10 USPQ2d 1438, 1444 (Fed. Cir. 1991)] which states that an enablement rejection under section 112, ¶1 is only appropriate where the written description fails to teach those skilled-in-the-art, like the Declarants, to make and use the invention.

69. The Examiner ignores Rule 132 which requires Applicant's solid, substantial, and timely, evidence submitted against the Examiner's rejections be considered because "(p)atentability is determined on the totality of the record, by a preponderance of the evidence with due consideration to persuasiveness of argument." [Id. at 1445, 24 USPQ2d at 1444]. Applicant has published his inventions, proving that this invention was correctly taught in the original specification and claims, on the filing date of the application.

70. The Examiner has ignored controlling authorities including Clause 8 of Section 8, Article I, by improperly eliminating an entire field involving energy and United States security.

The Examiner has ignored controlling authorities including Article VI, by interfering laws passed by Congress [Diamond v. Chakrabarty; 447 U.S. 303, 309] including that patentable statutory subject matter spans "anything under the sun that is made by man" [S. Rep. No. 1979, 82d Cong., 2d Sess., 5 (1952); H. R. Rep. No. 1923, 82d Cong., 2d Sess., 6 (1952)].

71. The Examiner has ignored controlling authorities including Article I, Section 2, by ignoring that Applicant is entitled to the privileges and immunities of citizens in the other states. Specifically, the Examiner ignores that the Office, Europe and Japan have allowed selected other patents in the very same field not allowed here [Czirr(5,231,290), Westphal(5,215,631), Ahern(5,411,654), Patterson(5,036,031), (5,318,675), (5,372,688), (5,036,031); Aspden, UK-GB 2,231,195B]. This is a dual-tiered system. No such demand was made of these other patents. There appear to be two different standards of review. Therefore, the Examiner has ignored controlling authorities including the reasoning of the Supreme Court in United States v. Nixon (1974) that all are "equal under the law". Hence, the Examiner has ignored controlling authorities including the 14th Amendment, requiring an impartial tribunal [28 U.S. Code Section 144, Mayberry v. Penna., 91 S.8.; Bloom v. Illinois, 88 Ct. 499 S.Ct. 1477; Duncan v. Louisiana, 88 S.Ct.1444] and equal protection. In the light of the previously unrebutted Declarations [hereby again submitted] there appear to be violations of the 14th Amendment's "equal protection" clause [Frontiero v. Richardson, 93 S.Ct. 1736, 411 U.S. 677; Weiss v. Weiss, 436 N.Y.S. 2d. 862, 52 N.Y. 2d. 170 (1981)] with serious implications [Gass v. Lopez, 95 S. Ct 729; Wood v. Strickland, 95 S Ct 9S2; U.S. v. Price, 86 S Ct 1152, 1157, Footnote 7; Griffin v. Breckenridge, 91 S Ct 179D; Gamez v. Toledo, 42 U.S.C.§1983, and Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics].

72. In summary, the invention at issue in this case, '765, is claimed by Claims 1-10, 12-19, 21, and 22, and is generally speaking a two-stage process involving loading of hydrogen into a metal electrode, such as palladium, including a first stage of electrode loading, followed by, a second stage of sudden rapid ('catastrophic') flow of the loaded hydrogen within the metal and means to extract product using magnetic field inhomogeneity, based on differential magnetic susceptibilities.

Most importantly, Examiner should have considered, and commented upon substantively, the submitted evidence including:

#1) Declarations from scientists of ordinary skill-in-the-art, who considered the specification and stated that the written description was sufficient. Applicant is acknowledged by those involved in the state-of-the-art (Lin 97, Fox 97, Fox 96A, Rothwell 96). Said evidence shows that the Office's position is in error.

#2) The published peer-reviewed scientific articles [including but not limited to Swartz, M., 1994 "Catastrophic Active Medium Hypothesis of Cold Fusion", Vol. 4. "Proceedings: "Fourth International Conference on Cold Fusion", sponsored by EPRI and the Office of Naval Research, and Swartz, 1998, Improved Electrolytic Reactor Performance Using  $\pi$ -Notch System Operation and Gold Anodes, Transactions of the American Nuclear Society, Nashville, Tenn 1998 Meeting, (ISSN:0003-018X publisher LaGrange, Ill) 78, 84-85 and Swartz(92, 94A, 97A, 97C)].

By ignoring such evidence consisting of Declarations, and peer-reviewed publications, the Examiner also ignores *In re Wands*, 858 F.2d 731, 737, 8 USPQ2d 1400, 1404 (Fed. Cir. 1988) which indicates that #1 or #2 are sufficient to demonstrate that the specification provides an adequately written description of the subject matter, including how to operate the invention, and claimed the invention so that an artisan, or those skilled-in-the-art, could practice it without undue experimentation. Either #1 or #2 prove that enablement, utility, and validation. Together, #1 and #2 have been submitted and Applicant submits that these together corroborate enablement of the present invention both *de facto* and *de jure*.

Therefore, in accordance with the foregoing arguments that Applicant has conformed with the requirements of sections 112 of the Patent Act, and reversal of the rejection of Claims 1-10, 12-19, 21, and 22 is respectfully requested, as required by the statute (35 USC 112).

**ARGUMENT REGARDING 35 USC §112 SECOND PARAGRAPH**

73. Claims 1-10, 12-19, 21 and 22 are rejected under 35 U.S.C. 112 second paragraph.

For each rejection under 35 U.S.C. 112, second paragraph, the Appellant hereby does fully and completely specify the errors in the rejection and how the claims particularly point out and distinctly claim the subject matter which applicant regards as the invention.

74. The appealed claims do not stand or fall together. Claims 1, 4, and 13 are separately patentable and do not stand or fall together because they are materially distinct with respect to 35 USC 112 second paragraph. Claims 1, 4, and 13 are separately patentable because they are not unduly multiplied, have separate limitations, and are required because the invention described by the original specification of the above-entitled application is very complex.

Claim 1 distinguishes and limits the invention, in a process for producing a product using a material which is electrochemically loaded with an isotopic fuel, to a method of controlling the loading which includes in combination, loading said isotopic fuel into said material, then providing means for producing a change in the quantity of said isotopic fuel within said material, creating thereby a catastrophic diffusion flux of said isotopic fuel within said material, providing a diffusion barrier to said diffusion flux of said isotopic fuel within said material, and thereby producing said product.

Claim 4 distinguishes and limits the invention, in a process using an isotopic fuel loaded into a material, to a two-stage method for controlling the loading which includes in combination loading said isotopic fuel into said material, then providing means for producing a change in the quantity of said isotopic fuel within said material, creating thereby a catastrophic diffusion flux of said isotopic fuel within said material.

Claim 13 distinguishes and further limits the invention to an apparatus to produce a product using a material loaded with an isotopic fuel, which includes in combination means to load said isotopic fuel into said material, means to produce a change in the quantity of said isotopic fuel within said material, means to produce a catastrophic diffusion flux of said isotopic fuel within said material, means thereby to produce said product.

**PURPORTED INDEFINITENESS - 35 USC §112 SECOND PARAGRAPH**

75. The Office inaccurately states,

*"Claims 1, 10 and 21 are vague, indefinite and incomplete as to what is actually the product. (Note this specific rejection that applied to previous claims 1-14 was not addressed in Applicant's response to the previous Office Action)"*

The Examiner is disingenuous. Applicant respectfully notes that this was discussed in the previous Communication on 12/3/02 with the Examiner on pages 14 through 16 and also pages 91 through 95 where it was also discussed through the prism of those skilled-in-the-art. Furthermore, it was again discussed by Applicant in the Communication of Applicant dated 5/5/03 to the Examiner's missive (with new arguments) of 3/20/03, including therein on pages 8 and 9..

Notwithstanding the above, it is disingenuous for the Examiner to claim there is indefiniteness. "... (I)ndefiniteness in claim language is of semantic origin" [In re Hammack, 427 F.2d 1384 n.5, 166 USPQ 209 n.5 (CCPA 1970)] because indefiniteness is the opposite of definiteness. Definiteness is a characteristic of a patent claim in which claim language makes the scope of the claim clear to a person skilled in the art to which the invention pertains [MPEP 2173, MPEP 2173.02, MPEP 2173.05(a)]. Pursuant, to MPEP 2173, Applicant claimed with particularity, and did point out and distinctly claim the invention. Applicant's claims are therefore definite because the claims are precise, clear, correct, and unambiguous to a person skilled-in-the-art and, therefore, there was definiteness. The specification did conclude claims particularly pointing out and distinctly claiming the subject matter. Applicant has fully complied with the definiteness requirement of the second paragraph of 35 U.S.C. §112. The original specification and claim adequately presented the claimed invention so that an artisan, or those skilled in the art, could practice it without undue experimentation [In re Wands, 858 F.2d 731, 737, 8 USPQ2d 1400, 1404 (Fed.Cir.1988)].

In this case, the products are obviously nuclear products and heat. Even the Examiner admitted such elsewhere in his communication. Even the affiants testified as such.

**Definiteness Corroborated By Declarants**

The Examiner has not responded to the fact that Definiteness is proven by way of Applicant's previously-submitted expert testimony [Ex parte Gray, 10 USPQ2d 1922, 1928 (Bd. Pat. App. & Inter. 1989)], including Declarations and Amicus Curiae Briefs. The Examiner purports that if an Affiant has actual knowledge of the invention, then said affiant is "not disinterested". This is absurd, illogical, unlawful, and not ethical.

The simple proof of definiteness is that there has never been a problem for the previous Examiner of '970 in this regard, or more importantly with the Declarants who are skilled-in-the-art or even with the court [In re Swartz 00-1107 and In re Swartz 00-1108]. Therefore, this Examiner must accurately discuss the invention as it is actually taught in the original specification and claims. The claimed invention should be the focus of the definiteness requirement.

#### **Definiteness Supported By The Claims**

76. The Examiner has not responded to the fact that there is definiteness because the pending claims must be given the broadest reasonable interpretation consistent with the specification [In re Prater, 415 F.2d 1393, 162 USPQ 541 (CCPA 1969), also MPEP Section 2111 - Section 2111.01] and the specification stated the meaning of the terms in the claims [In re Zletz, 893 F.2d 319, 13 USPQ2d 1320 (Fed. Cir. 1989)]. Furthermore, there is definiteness because pursuant to 2173.05(a) the meaning of every term used in the claims was apparent from the prior art, cited art, and from the specification and drawings at the time the application was filed. There is definiteness because the claims must each be given the broadest reasonable interpretation consistent with that which one who is skilled-in-the-art would reach [In re Morris]. In this case, it is corroborated by both the Declarations, Amicus Briefs, and peer-reviewed publications.

#### **Definiteness Supported By The Office Rules**

The Examiner has not responded to the fact that there is definiteness consistent with Office Rules. The preamble of claim 1 recites the purpose of the process, and the process steps are able to stand alone (MPEP 2111.02). Pursuant to 2173.05(b), the fact that claim language may not have been precise cannot automatically render the claim indefinite under 35 U.S.C. 112, second paragraph [Seattle Box Co., v. Industrial Crating & Packing, Inc., 731 F.2d 818, 221 USPQ 568 (Fed. Cir. 1984)].

#### **Additional Reason Overcoming The Examiner's Position - Definiteness Supported By Probative Reference**

77. The Examiner has not responded to the fact that the peer-reviewed reference support definiteness [Swartz (1992), Swartz (1994A), Swartz (1994B), Swartz (1997A), Swartz (1997B), Swartz (1998A)] which prove understanding by one skilled in the art [Atmel Corp. v. Information Storage Devices Inc., Fed. Cir., No. 99-1082, 12/28/99].

**Additional Reason Overcoming The Examiner's Position - Definiteness Proven By Other Rejections**

Regarding the rejection of Claims 1-10, 12-19, 21 and 22 under 35 U.S.C. 112 second paragraph, Applicant notes to the Examiner that there has to have been definiteness with respect to the present invention because it is a Continuation and because the Examiner could not have made the previous rejections under 35 U.S.C. 102 had the invention truly been without definiteness. Applicant reserves the right to Petition this matter, especially in the light of the un-rebutted ignored Declarations.

78. In summary, there IS definiteness because acceptability of the claim language depends on whether one of ordinary skill-in-the-art would understand what is claimed, and that is confirmed by the light of the specification, the Declarations, the Amicus Briefs, and the peer-reviewed publications [Ex parte Porter, 25 USPQ2d 1144, 1145 (Bd. Pat. App. & Inter. 1992)]. The invention at issue in this case, '765, is claimed by Claims 1-10, 12-19, 21, and 22, and is generally speaking a two-stage process involving loading of hydrogen into a metal electrode such as palladium, including a first stage of electrode loading, followed by, a second stage of sudden rapid ('catastrophic') flow of the loaded hydrogen within the metal and means to extract product using magnetic field inhomogeneity, based on differential magnetic susceptibilities.

Given this, the Examiner has not responded to the fact that 35 U.S.C. 112, second paragraph requires the Examiner had to provide reasons why the terms in the claims and/or scope of the invention are unclear

**"in a positive and constructive way, so that minor problems can be identified and easily corrected, and so that the major effort is expended on more substantive issues."**

All definiteness issues were addressed, and Appellant explicitly wrote that if there are other issues with Claims 1-10, 12-19, 21, and 22, the Examiner was asked to identify with specificity and clear explanation what the rejection is based on [Ex parte Ionescu, 222 USPQ 537,539 (Bd. App. 1984)]. He has yet to speak precisely and substantively.

Therefore, this rejection should be reversed.

## ARGUMENT REGARDING 35 USC §112 SECOND PARAGRAPH ON PURPORTED NEW MATTER

79. The Examiner states,

*"Applicant addressed this problem by deleting references to "fuel cells", replacing "hydrogen storage" with "hydrogen loading" and deleting "pressure" in the term "pressure-loaded" metals in the statement of relevance of the claimed invention. This change would still not qualify the current application as a continuation of S/N 09/760,970 because there are still significant differences in the subject matters..."*

### **THE TRUTH - Not New Material**

The Examiner is incorrect for several reasons. First, the addition of hydrogen storage, hydrogen loading, pressure, and pressure loading are not new material. Instead, these matters were discussed at length in the original specification and claims of which the above-entitled invention is a continuation, and they were also discussed at length in the record of that patent application. They were also discussed in the submitted declarations (systematically substantively ignored to this point in time). The alleged new material was already discussed in the previous communication from the Applicant to the Examiner, dated 12/3/02, on page 13. Where is the Examiner's substantive response?

Furthermore, it was again discussed by Applicant in the Communication of Applicant dated 5/5/03 including therein on pages 5 through 7. Where is the Examiner's substantive response? The Examiner has ignored the Applicant's detailed Arguments about this.

The Office has not shown good-faith execution of MPEP 707.07(j) and MPEP 706.03(d) following duly-served requests for entry of such suggestions.

80. The Examiner states,

*"The parent application refers to "electrochemical nuclear fusion in or about metals" that is different from the broader subject matter of "electrochemical reactions in or about metals" in the current application.*

### **THE TRUTH - Not New Material**

The Examiner is incorrect for several reasons. First, electrochemical nuclear fusion is the same as electrochemical reactions in or about metals which were discussed in the original application and claims (' 970) and the above-entitled application-(' 765). Second, these reactions are not new material since they were in both applications. Furthermore, the identical nature of the two descriptions is not new material, because it was an ' 970.

The Examiner states,

*Also, the parent case specifically highlights the relevance of the claimed invention to "cold nuclear fusion in pressure loaded metals" whereas the current case deletes the "cold" term and refers only to "nuclear fusion in loaded metals." Accordingly, the current application cannot claim priority to the 9/17/91 filing date of the S/N 09/760,970."*

**THE TRUTH - Not New Material**

The Examiner is incorrect for several reasons. First, cold nuclear fusion in loaded metals is the same as cold nuclear fusion in pressure loaded metals. The Examiner has given not a single reason for his misinterpretation of this matter and those above (super). Second, these are not new material by are from the original application and the specification and claims ('970).

The Examiner states,

*"Change from "applied magnetic field" to "applied spatially inhomogeneous magnetic field", shown as underlined in amended claim 2."*

**THE TRUTH - Not New Material**

The Examiner's claim that "homogeneous" magnetic fields, "spatially homogeneous", "redistribution of isotopic fuel into said material", are new is absolutely false. First, these could hardly be new material because they were discussed in the patent application of which the present application is a continuation ('970), and the present application which discussed this. The concepts and words were used in the original application,

Second, proving this are the several Declarations which were submitted previously.

Third, there are orders (Exhibit "C") for the Examiner to address the declarations of Dr. Swartz and Strauss which discuss exactly this. How could it be new? And where is the response? Where is the evidence that the Examiner has ever addressed any of the declarations substantially? Therefore, the Applicant requests the Examiner reconsider this issue.

The Examiner states,

*"The amendment is objected to under 35 U.S.C. 132 because introducers new matter into the disclosure. ....*

*The added material, which is not supported by the original disclosure, is as follows:*

*Patent Applications 08/406,457 and 09/573,381 shown underlined under "U.S. Patent Documents" on page 96, "*

*"Applicant is required to cancel the new matter in the reply to this Office Action."*

*"all references shown underlined under "Other Publications" on page 97, "*

*"as well as all citations to these references in the revised specification."*

#### **THE TRUTH - Not New Material**

The Examiner is unfair and disingenuous for several reasons. First, these changes were made only in response to his suggestion, and orders.

Second, none of this was new material and has been in previously submitted pending applications.

Third, although the applicant will be glad to remove these improper citations, but the Examiner appears not to have read the materials carefully, corroborated by his getting the claims wrong (above) and ignoring multiple arguments made by the Applicant in the previous Communication (below). Thus, it does seem unfair that the Examiner systematically requests/orders/suggested said changes and then attacks the applicant for making them.

Fourth, as the Applicant stated to the Examiner over the telephone in '695 (another divisional of '970) where the Examiner made a similar inaccurate statement, the Applicant respectfully disputes the purported "*addition of new matter*" and has asked the foundation for the Examiner's statement. How can '381 be new material when it is a divisional of the same original specification and claims?

Fifth, the Applicant disputes the addition of new matter regarding '457 because '457 is a different patent application preceeding the filing date of the present application, and the Applicant reminds the Examiner that the Court has stated that reference to other patents is allowable.

**"An original specification can also incorporate by reference subject matter disclosed in another patent application which is pending before the Patent Office and hence unavailable to the public."**

[In re JOLLES; United States Court of Customs and Patent Appeals, 1980, 628 F.2d, 1322, 206 USPQ 885]

The Applicant disputes the "addition of new matter" statement regarding reference material well-known to those skilled-in-the-art made after the Examiner requested it. The Examiner should address at least two facts: In re Jolles applies to other Applicants, and '381 is a Divisional from the same identical application ('970). Also, it is egregious that the Examiner asked for the background references. Finally, these are NOT new material. Applicant swore so by Declaration, as did other affiants who are educated and skilled-in-the-art. The Declarants stated facts, not opinion. The standards of review require the Examiner to explain precisely and substantively why he disagrees. Therefore, the Applicant requests the Examiner reconsider this matter. Applicant reserves the right of Petition, if necessary, given the changes were made after the demand/suggestions/orders of the Examiner.

81. In summary, and most importantly, Examiner should have considered, and commented upon substantively, the submitted evidence including:

#1) Declarations from scientists of ordinary skill-in-the-art, who considered the specification and stated that the written description was sufficient. Applicant is acknowledged by those involved in the state-of-the-art (Lin 97, Fox 97, Fox 96A, Rothwell 96). Said evidence shows that the Office's position is in error.

#2) The published peer-reviewed scientific articles [including Swartz, 1998, Improved Electrolytic Reactor Performance Using  $\pi$ -Notch System Operation and Gold Anodes, Transactions of the American Nuclear Society, Nashville, Tenn 1998 Meeting, (ISSN:0003-018X publisher LaGrange, Ill) 78, 84-85 and Swartz(92, 94A, 97A, 97C)].

By ignoring such evidence consisting of Declarations, and peer-reviewed publications, the Examiner also ignores In re Wands, 858 F.2d 731, 737, 8 USPQ2d 1400, 1404 (Fed. Cir. 1988) which indicates that #1 or #2 are sufficient to demonstrate that the specification provides an adequately written description of the subject matter, including how to operate the invention, and claimed the invention so that an artisan, or those skilled-in-the-art, could practice it without undue experimentation. Either #1 or #2 prove that enablement, utility, and validation. Together, #1 and #2 have been submitted and Applicant submits that these together corroborate enablement of the present invention both *de facto* and *de jure*.

Therefore, in accordance with the foregoing arguments that Appellant has conformed with the requirements of sections 112 of the Patent Act, and reversal of the rejection of Claims 1, 10, 11, 21, 22, and 24-30 is respectfully requested, as required by the statute (35 USC 112).

## ARGUMENT REGARDING 35 U.S.C. §102

82. For each rejection under 35 U.S.C. 102, the Appellant hereby does fully and completely specify the errors in the rejection and why the rejected claims are patentable under 35 U.S.C. 102, including any specific limitations in the rejected claims which are not described in the prior art relied upon in the rejection.

Claims 1-10, 12-19, 21 and 22 are rejected under 35 U. S. C.102(b) as being anticipated by Westfall (US 5,215,631), Claims 1, 2, 4, 5, 7, 10, 13, 15, 16 and 21 are rejected under 35 U.S.C. 102(b) as being anticipated by Kinsella et al.(US 3,682,806), and Claims 1-8 and 13-16 are rejected under 35 U.S.C.102(b) as being anticipated by Patterson (US 5,318,675) or Patterson (US 5,372,688).

The appealed claims do not stand or fall together. Claims 1, 4, and 13 are separately patentable and do not stand or fall together because they are materially distinct with respect to 35 USC 102. Claims 1, 4, and 13 are separately patentable because they are not unduly multiplied, have separate limitations, and are required because the invention described by the original specification of the above-entitled application is very complex. Claim 1 distinguishes and limits the invention, in a process for producing a product using a material which is electrochemically loaded with an isotopic fuel, to a method of controlling the loading which includes in combination, loading said isotopic fuel into said material, then providing means for producing a change in the quantity of said isotopic fuel within said material, creating thereby a catastrophic diffusion flux of said isotopic fuel within said material, providing a diffusion barrier to said diffusion flux of said isotopic fuel within said material, and thereby producing said product. Claim 4 distinguishes and limits the invention, in a process using an isotopic fuel loaded into a material, to a two-stage method for controlling the loading which includes in combination loading said isotopic fuel into said material, then providing means for producing a change in the quantity of said isotopic fuel within said material, creating thereby a catastrophic diffusion flux of said isotopic fuel within said material. Claim 13 distinguishes and further limits the invention to an apparatus to produce a product using a material loaded with an isotopic fuel, which includes in combination means to load said isotopic fuel into said material, means to produce a change in the quantity of said isotopic fuel within said material, means to produce a catastrophic diffusion flux of said isotopic fuel within said material, means thereby to produce said product.

Appellant acknowledges, but respectfully disputes, for the reasons discussed below said rejection.

The invention at issue in this case, '765, claimed by Claims 1-10, 12-19, 21, and 22, is generally speaking a two-stage process involving loading of hydrogen into a metal electrode such as palladium, including a first stage of electrode loading, followed by, a second stage of sudden rapid ('catastrophic') flow of the loaded hydrogen within the metal and means to extract product using magnetic field inhomogeneity, based on differential magnetic susceptibilities. Each of these features, and those of the original specification of which this is the divisional, is novel. The original specification describes the subject matter defined by each of the rejected claims, and enables any person skilled in the art to make and use the subject matter defined by each of the rejected claims, and sets forth the best mode contemplated by the inventor of carrying out his invention. The novelty and usefulness of the original specification was demonstrated to be correct at the time of the original filing in Fusion Technology (of the American Nuclear Society) and elsewhere which demonstrate operability and utility [validation]. These include, but are not limited to, the following: Swartz, 1994, "Catastrophic Active Medium Hypothesis of Cold Fusion", 4, "Proceedings: "Fourth International Conference on Cold Fusion" sponsored by EPRI and the Office of Naval Research, Swartz (1998), Improved Electrolytic Reactor Performance Using  $\pi$ -Notch System Operation and Gold Anodes, Transactions of the American Nuclear Association, Nashville, Tenn 1998 Meeting, (ISSN:0003-018X publisher LaGrange, Ill) 78, 84-85, Swartz. (1997), Fusion Technology, 31, 63-74.

83. The Office states,

*"Claims 1-10, 12-19, 21 and 22 are rejected under 35 U.S.C.102(b) as being anticipated by Westfall (US 5,215,631)."*

Applicant respectfully notes that this was discussed in the previous Communication with the Examiner on pages 17 through 22 and page 39. The Applicant thanks the Examiner for his response to a few of the comments (and they are addressed below), but where is the Examiner's substantive response to the rest?

Furthermore, it was again discussed by Applicant in the Communication of Applicant dated 5/5/03 including therein on pages 11 through 19. Where is the Examiner's substantive response?

Many of the corrections below are because the Examiner did not respond in detail, precisely to what the Applicant stated.

84. The Office states,

*"(The Applicant previously said) 'The application was filed prior to Westfall.' Westfall's patent has a priority date of April 25, 1990 that is more than one year prior to the 12/28/00 filing date for the current application."*

**THE TRUTH - The Application is a Continuation of a 1991 Application**

Westfall was issued June 1, 1993 and was filed October 11, 1991. Westfall is a "continuation in part of serial number 514,192 which was abandoned, and certainly as different from the present application as Westfall. Ignoring for the moment that Westfall's invention is very different from the invention described by the present application, the examiner should know that the present application is a continuation calls a filing made 9/17/91.

85. The Office states,

*"(The Applicant previously said) 'Westfall does not have the purpose, advanced technology, 'features and advantages of the claimed invention.' These are immaterial because file claims define the invention and the claims are the ones examined for patentability. The examiner has shown that Westfall's process and apparatus read on file applicant's claims."*

**THE TRUTH - Two Obviously Different Inventions**

This statement by the examiner is minimizes the scope of the differences between Westfall and the present invention. In the present invention, Figure 7 of the original specification, absolutely shows features which are not found in Westphal. For example, attention is directed to the four concentric components of the device surrounding the cathode, in coaxial fashion, including the deuteron diffusion barrier (labeled 50) and the expansion barrier (labeled 40). Where are they in Westphal? Attention is directed to the heavy water-LiOD-gel, labeled 6. Where is it in Westphal? Attention is directed to the device in Figure 7 shaped like a fuse, which "can be easily placed into, or removed from, an assembly and system". Where is it in Westphal?

In the present invention, Figure 8 shows features which are not found in Westphal. For example, attention is directed to the centrally placed axially-filled cathode, the coaxial deuteron-barrier, the coaxial expansion-barrier. Where are they in Westphal? Attention is directed to the structural support system (labeled 20), the expansion barrier (labeled 40), and the deuteron impermeable barrier (labeled 50). Where are they in Westphal?

In the present invention, Figure 9 shows features which are not found in Westphal. Attention is directed to the cluster of seven CAM devices, with their external structural casing support system and intercluster thermomechanical material. Where are they in Westphal?

In the present invention, Figure 10 shows features which are not found in Westphal. Attention is directed to the central axially-filled cathode, the two coaxial deuteron-barriers inner thermal pipe, and the structural support system labeled 20. Attention is also directed to the inner thermal barrier labeled 70, the outer deuteron barrier labeled 50, and the barrier to expansion is labeled 20. Exactly where are any of these in Westphal? In the present invention, Figure 10 shows four layers (from inner to outer) which in the preferred embodiment are made of diamond filament, gold, palladium, and gold. Where are they in Westphal?

In the present invention, Figure 11 shows features which are not found in Westphal. For example, attention is directed to the coaxially-filled cathode, the inner coaxial deuteron-barrier and thermal pipe in a cylindrical configuration, the electric fields in the radial direction, and the anode which is circumferential to the cathode [labeled 7]. Where are they in Westphal? Figure 11 shows solution (labeled 6) which consists of lithium deuterioxide, palladium deuterioxide, and heavy water as the preferred embodiment. Where is it in Westphal?

In the present invention, Figure 12 shows features which are not found in Westphal. attention is directed to the three CAM devices (labeled as 90), the intradevice gel containing lithium and palladium deuterioxide (labeled 6), the device receptor apparatus (labeled 93 in figure 12), the electrical and thermal connectors (labeled 96, and 97 respectively), the mechanical connecting system (labeled 94), the heat dissipative radiator (labeled 95), and the three cathodic connectors are connected to the control apparatus. Where is it in Westphal? Figure 12 shows CAM devices which are inserted, similar to a fuse onto a holding board (labeled 91) held in place by clips (labeled 92). Exactly where are any of these in Westphal?

In the present invention, Figure 13 shows features which are not found in Westphal. For example, attention is directed to the lamellar CAM reactor, the two orthogonal applied electric fields, the connections for the first electric field labeled as 81 and 82, the connections for the second electric field labeled as 85 and 86, the mechanical casing labeled 20, and the deuteron impermeable barrier which is comb-shaped in this preferred configuration, and is labeled 55 in Figure 13. Exactly where are any of these in Westphal?

In the present invention, Figure 14 shows features which are not found in Westphal. For example, attention is directed to the three lamellar CAM reactors labeled as 90 in figure 14, and the intradevice gel containing lithium and palladium deuterioxide (labeled 6), and anode (labeled 7) held in place by clips (labeled 102), the electrical bus to connect the anodes (labeled 105) which are connected to the anodic connectors (labeled 82), and the electrical bus which connects the cathodes (labeled 106 and 107). Where are these in Westphal? Attention is also directed to the thermal bus (labeled 107) connected to the heat pipes (labeled 70) which are held in a mechanical connecting system (labeled 20), the deuteron-impermeable barriers (labeled 55 in figure 14), the heat pipes (70) and the thermal bus (107). Are any of these in Westphal?

In the present invention, Figure 15 shows features which are not found in Westphal. For example, attention is directed to the mechanical casing labeled 20, the deuteron impermeable barrier labeled 55, and the external structures labeled 110 and 120, circumferential to the casing (20) which are used to squeeze the CAM reactor. Where are they in Westphal?

In the present invention, Figure 16 shows features which are not found in Westphal. Attention is directed to the three pressure-activated CAM reactors, the heat pipes (labeled 70), the expansion barrier (40), the deuteron diffusion barrier (labeled 50), the external casing (20), the thermomechanical connector (labeled 130), the external thermal bus (140), holding board (150, 151 above and below the assembly), and the external structures labeled 110 and 120 near-circumferential. Where are they in Westphal?

In the present invention, Figure 17 shows features which are not found in Westphal. For example, attention is directed to the transistor-like header (labeled as 200). Where is this in Westphal? Attention is directed to the perforated by six (6) holes accommodate insulators (labeled 210), the six electric leads (182, 185, 181, and 186), and two thermal connections (labeled 170 in figure 17). Where are they in Westphal?

In the present invention, Figure 18 shows features which are not found in Westphal. For example, attention is directed to the extraction of isotopic nuclear fusion product (e.g. tritium) by an axially loaded cathode (labeled 1; anode is labeled 7) using an inhomogenous magnetic field intensity applied by coil labeled 300 to one portion of the cathode (1). Where is any of this in Westphal?

86. The Office states,

*" (The Applicant previously said) 'Westfall's electrode keeps moving unlike the claimed invention.'*

*This is immaterial. The feature cited by the Applicant is non-limiting because it is not recited in file claims. ...."*

**THE TRUTH - - Different Inventions - Even The surface of Westfall's Electrode changes Position**

This statement by the examiner is false. This is corroborated by the Office's own statement that Westfall discloses,

*"... a process and an apparatus for growing crystals by electrodeposition."*

This is further corroborated because in 631, the crystals grow to become freestanding single crystals of tin in its cubic and tetragonal forms. 631 uses said grown crystals to make photovoltaic cells, as discussed in column 13, lines 55 through 66.

The cited US 5,215,631 does not even discuss loading. It instead discloses said electrode growing (unlike the present invention) at 4.2 feet per hour (column 36 lines 17 through 22). Westfall --as it claims-- is simply a process and an apparatus for growing crystals in linear growth rate (column 36 lines 17 through 22), useful for freestanding single crystals of tin in its cubic and tetragonal forms.

Westfall's crystals, grown at 4.2 feet per hour, do not have the purpose, advanced technology, features, and advantages of the present invention. By contrast, the present invention is not a process and an apparatus for growing crystals by electrodeposition, but in the preferred embodiment, a two-stage process involving loading of hydrogen into a metal electrode such as palladium, including a first stage of electrode loading, followed by, a second stage of sudden rapid ('catastrophic') flow of the loaded hydrogen within the metal and means to extract product using magnetic field inhomogeneity, based differential magnetic susceptibilities, features of great utility. This is clearly shown in the Figures, and discussed, in the original specification of 765.

Thus, the present invention is novel and not anticipated by the cited art, Westfall.

87. The Office states,

*"(The Applicant previously said) 'Materials and elements used by Westfall would not function if used in the claimed. Conversely, the materials and elements used in the invention would not function in Westfall's invention.'*

*The rejection was based not on file swapping of materials and elements, but whether the claimed method steps and apparatus elements are identical to or could be read into the prior art, which is the case for Westfall.*

**THE TRUTH - The Environments, Methods, and Elements Are Radically Different**

This statement by the examiner is false. If the materials and elements used in Westfall, as suggested by the examiner, were to be used in the present invention, they would not function. Westfall --as it claims-- is simply a process and an apparatus for growing crystals in linear growth rate (column 36 lines 17 through 22), useful for freestanding single crystals of tin in its cubic and tetragonal forms. Furthermore, if the present invention was used as discussed in Westfall, the materials of '765 would not even be functional. Temperatures required for Westfall are such that, "crucibles must be chosen which are able to survive the corrosive nature of the molten salt baths" (column 32 lines 55 through 59). If the present invention, '765, was used as described in Westfall, it would not even work. The Examiner should address this.

88. The Office states,

*e. (The Applicant previously said) 'Westfall loads hydrogen outside the metal instead of inside the metal.'*

*Westfall discloses palladium as working electrode and his electrolyte is an aqueous solution that inherently contains hydrogen. Palladium is known to absorb deuterium, i.e., be loaded inside the metal. Applicant himself admits this as a well-known scientific fact by his claims.*

**THE TRUTH - The Examiner is Incorrect about Location and Loading**

This statement by the examiner is false for several reasons, each of which proves that the material of Applicant's invention, '765, does not read on Westfall's process as the Examiner suggests.

First, when hydrogen appears in Westfall it is not for loading. It is to the air as gas (column 9, line 35 through 43, especially lines 39 referring to "bubbling"). This is different from that used in the present invention which is loaded as taught in the present invention's original specification and claims, and will be explained in detail below. This "bubbling" of hydrogen in Westfall is different from this application which involves loading an isotopic fuel to said material, loading said isotopic fuel into said material by an applied electric field, and then at a later point in time applying a second applied electric field to redistribute said isotopic fuel within said material, means to control the distribution of the loaded isotopic fuel within the material, means

including barriers impermeable to the flow of said isotopic fuel within said material, as discussed in the present invention's original specification and claims.

This is corroborated because there is no mention of internal flows in the metal in Westfall. Furthermore, in Westfall all applied fields are synchronous, whereas in '765 they are metachronous (at different points in time).

Second, unlike the present invention, Westfall does not discuss loading which would be negligible at best. Furthermore there is no mention of internal flows within any part of Westfall. Corroborating this, in the present invention, the hydrogen sought is that within the palladium, which is not even discussed in Westfall.

The Examiner should discuss this which was previously addressed on pages 17-22, 39, and 57-71.

To wit, the present invention uses hydrogen INSIDE a metal such as palladium for purposeful reasons, which are clearly different from the ions making large crystals quickly OUTSIDE the metal, such as described in Westfall. Attention is directed to the fact that in Westfall, unlike the present invention, there are enlarging metal crystals, ribbon crystalline growth systems, tin in its cubic and tetragonal forms, and crucibles using molten salt baths. Westfall's invention, a process and an apparatus for growing crystals of tin in its cubic and tetragonal forms controls ions OUTSIDE of the enlarging metal crystals (figures 2a through 2d, therein). Westfall refers to saturation OUTSIDE of the metal crystal and is an entirely different teaching from the present invention. Westfall does not even discuss loading into the material (underlined in Examiner's quote for emphasis). Furthermore there is no mention of internal flows within any part of Westfall. Thus, it cannot read on the present invention, a two-stage process involving loading of hydrogen into a metal electrode such as palladium, including a first stage of electrode loading, followed by, a second stage of sudden rapid ('catastrophic') flow of the loaded hydrogen within the metal and means to extract product using magnetic field inhomogeneity, based differential magnetic susceptibilities.

Corroborating this, Westfall admits that the apparatus of Westfall is no more than a means to a process and an apparatus for growing crystals by electrodeposition with rapid metal growth rates at 4.2 feet per hour (column 36 lines 17 through 22). Westfall admits it makes photovoltaic cells (column 13, lines 55 through 66). Westfall also admits that crucibles must be chosen which are able to survive corrosive molten salt baths (column 32 lines 55 through 59).

Thus, the present invention is novel and not anticipated by the cited art, Westfall. Nowhere in Westfall, or in any combination of the Examiner's art, is any aspect of the features of '765. Thus, it cannot read on the present invention, a two-stage process involving loading of hydrogen into a metal electrode such as palladium, including a

first stage of electrode loading, followed by, a second stage of sudden rapid ('catastrophic') flow of the loaded hydrogen within the metal.

89. The Office states,

*"(The Applicant previously said) "It is nonsense to consider Westfall's crystal growth being product removed through the growing metal crystal as the same as heat produced in the present invention."*

*This is precisely the point raised by the examiner on page 19 of the previous Office Action that rejected file claims because they are incomplete in failing to recite additional critical method steps and/or structure.*

**THE TRUTH - Products are as Different as the Inventions and Locations**

This statement by the examiner is false. Heat and loading are as different as heat and charge or heat and the number of oranges in a basket. They are different. Furthermore, even the locations involved are different. US 5,215,631 discloses a process and an apparatus for growing crystals by electrodeposition which 1) involves ions other than hydrogen, 2) and they are on the OUTSIDE of the metal. Unlike the present invention, Westfall does not discuss loading. Furthermore there is no mention of internal flows within any part of Westfall.

Westfall's invention, a process and an apparatus for growing crystals of tin in its cubic and tetragonal forms controls ions OUTSIDE of the enlarging metal crystals (figures 2a through 2d, therein). Westfall refers to saturation OUTSIDE of the metal crystal and is an entirely different teaching from the present invention. 631 does not even discuss loading into the material (underlined in Examiner's quote for emphasis). Furthermore there is no mention of internal flows within any part of 631. Corroborating this, Westfall admits that the apparatus of Westfall is no more than a means to a process and an apparatus for growing crystals by electrodeposition with rapid metal growth rates at 4.2 feet per hour (column 36 lines 17 through 22). Westfall admits it makes photovoltaic cells (column 13, lines 55 through 66). Westfall also admits that crucibles must be chosen which are able to survive corrosive molten salt baths (column 32 lines 55 through 59).

By contrast, the original specification and claims of the present invention, '765, claim a two-stage process involving loading of hydrogen into a metal electrode such as palladium, including a first stage of electrode loading, followed by, a second stage of sudden rapid ('catastrophic') flow of the loaded hydrogen within the metal and means to extract product using magnetic field inhomogeneity, based differential magnetic susceptibilities.

Therefore, the material of Applicant's invention, '765, does not read on Westfall's process and an apparatus for growing crystals by electrodeposition, as the Examiner suggests. The apparatus described in Westfall has none of the properties of the apparatus described in the present invention. This demonstrates they are different patents entirely with different uses, reasons, and methods.

90. The Office states,

*Westfall anticipates the applicant's method and claims but he does not claim production of excess heat. Therefore, there must be a critical feature of the claimed invention that is missing in the disclosure.*

**THE TRUTH - Multiple Critical Features are Present in this Invention**

This statement by the examiner does not address that the present invention has many novel features which are simply not present in Westphal. For example, the Examiner should consider the following, without demeaning any of the other features of the present invention.

In the present invention, Figure 10 shows features which are not found in Westphal. Attention is directed to the inner thermal barrier labeled 70, the outer deuteron barrier labeled 50, and the barrier to expansion is labeled 20. Exactly where are any of these in Westphal?

In the present invention, Figure 11 shows features which are not found in Westphal. For example, attention is directed to the coaxially-filled cathode, and thermal pipe in a cylindrical configuration, and the anode which is circumferential to the cathode [labeled 7]. Where are they in Westphal?

In the present invention, Figure 12 shows features which are not found in Westphal. Attention is directed to the three CAM devices (labeled as 90), the mechanical connecting system (labeled 94), and the heat dissipative radiator (labeled 95). Exactly where are any of these in Westphal?

In the present invention, Figure 14 shows features which are not found in Westphal. For example, attention is directed to the thermal bus (labeled 107) connected to the heat pipes (labeled 70) which are held in a mechanical connecting system (labeled 20), the heat pipes (70) and the thermal bus (107). Are any of these in Westphal?

In the present invention, Figure 16 shows features which are not found in Westphal. Attention is directed to the heat pipes (labeled 70), the thermomechanical connector (labeled 130), and the external thermal bus (140) and holding board (150, 151 above and below the assembly). Where are they in Westphal?

In the present invention, Figure 17 shows features which are not found in Westphal. For example, attention is directed to the transistor-like header (labeled as 200), especially the two thermal connections (labeled 170 in figure 17). Where are they in Westphal?

Attention is also directed to the fact that the following elements shown in Westfall are not present, or needed, or claimed in the present invention. Said unneeded elements numbered in Westfall as bath (4, column 8, line 5), reference electrode (14), light source (18), stepping motor (22) and its mechanical connection to the cathode (8) are not needed in the present invention, as described in the original specification and claims, thereby proving the present invention has significant novelty and non-obviousness -- and is simply a different invention.

91. The Office states that Westfall is the same as the present patent even though Westfall discloses,

*"... the electrolytic apparatus ... comprising a bath (4) between a working electrode (where the crystal growth occurs) and a counter electrode (which replenishes the electrolytic solution's concentration of ions of the to-be-deposited material. The bath is used by passing current between the working and counter electrodes"*

**THE TRUTH - Different Purposes.** Westfall makes growing crystals at 4.2 feet per hour

US 5,215,631 discloses a process and an apparatus for growing large crystals by electrodeposition. Westfall, as discussed therein, grows enlarging metal crystals as shown in figures 2a through 2d, therein. Westfall's invention is to produce dendritic crystals and explicitly involves ribbon crystal and crystalline growth systems with growth rates (deposition rates) of 4.2 feet per hour in linear growth rate (column 36 lines 17 through 22). Westfall's crystals, grown at 4.2 feet per hour, do not have the purpose, advanced technology, features, and advantages of the present invention.

Unlike Westfall, '765 teaches a two-stage method to control loading which solves the long-standing problem of controlling hydrogen flow in metals and extracting product using magnetic field inhomogeneity based differential magnetic susceptibilities - features of great utility. This is clearly shown in the Figures, and discussed, in the original specification of '765. The present invention, '765, claims a two-stage process involving loading of hydrogen into a metal electrode such as palladium, including a first stage of electrode loading, followed by, a second stage of sudden rapid ('catastrophic') flow of the loaded hydrogen within the metal and means to extract product using magnetic field inhomogeneity, based differential magnetic susceptibilities, as taught in the above-entitled patent application.

92. The Office states that Westfall reads on,

*"Note also that since the Westfall's process and apparatus read on applicant's process and apparatus claims, the same can be said regarding applicant's claim language of "creating a catastrophic diffusion flux of said isotopic fuel in said material."*

**THE TRUTH -Catastrophic Flow differs from Electrochemical Throwing power**

The material of Applicant's invention, '765, does not read on Westfall as the Examiner suggests. Westfall's enlarging metal crystals (figures 2a through 2d, therein) in ribbon crystal and crystalline growth systems have claims and teachings which are not the same as a two-stage process involving loading of hydrogen into a metal electrode such as palladium, including a first stage of electrode loading, followed by, a second stage of sudden rapid ('catastrophic') flow of the loaded hydrogen within the metal and means to extract product using magnetic field inhomogeneity, based differential magnetic susceptibilities, as taught in the above-entitled patent application.

93. The Office states that ,

*"Westfall further discloses the use of orthogonal electric fields as part of the nucleation manipulation techniques for crystal growth control. .. The orthogonal electric field reads on "means for producing a change in the quantity of said isotopic fuel."*

**THE TRUTH - Different Current Locations, Purposes, Time courses**

Westfall does not disclose orthogonal electric fields as taught in the present invention's original specification. The present invention uses them within the electrode as the specification and claims prove. Thus the material of Applicant's invention, '765, does not read on Westfall's process and apparatus for growing crystals by electrodeposition, as the Examiner suggests. This invention is a two-stage process involving loading of hydrogen into a metal electrode such as palladium, including a first stage of electrode loading, followed by, a second stage of sudden rapid ('catastrophic') flow of the loaded hydrogen within the metal and means to extract product using magnetic field inhomogeneity, based differential magnetic susceptibilities. Two stage process here after loading. Not in Westfall. Furthermore, in Westfall, all applied electric field intensities are synchronous in time, whereas in '765 they are applied metachronously (at different points in time).

### == Error By Examiner Regarding Contamination ==

94. The Office inaccurately states,

*"Note further that West fall's aqueous solution contains ordinary water, which, in turn, has 0.01 6% heavy water content (see Etherington, Nuclear Engineering Handbook, p 8-27). This reads on the claim language regarding having deuterium in the isotopic fuel. Wesffall inherently also has a means to remove the product, i.e., formed crystal. Again, applicant's claim language reacts on such."*

### THE TRUTH - Contamination Quantity Is Insufficient

With all due respect, this is inaccurate because any putative cationic contaminant which the Examiner proposes, but for which there is no plan, will electrodeposit. Furthermore, as discussed with the Examiner previously, because of the divergence principle (no net creation of the putative contaminant so therefore the divergence = 0). The Examiner should read the books which the Applicant suggested previously regarding this because they are well-known to those familiar with the state-of-the-art. The applied electric field is direct to move cations (i.e.  $\text{Pd}^{++}$ ) to the cathode where it plates out. The Examiner is referred to the following on electrochemistry and continuum electrodynamics, *sine qua non* to those skilled in the art [Uhlig, H.H., "Corrosion and Corrosion Control", Wiley (1971), Bockris, J., K.N. Reddy, "Modern Electrochemistry", Plenum Press (1970), Von Hippel, A. "Dielectric Materials and Applications", MIT Press, (1954); Von Hippel, A., D.B. Knoll, W.B. Westphal, "Transfer Of Protons Through 'Pure' Ice Ih Single Crystals", J. Chem. Phys., 54, 134, (also 145), (1971), and Melcher, J.R., "Continuum Electromechanics", MIT Press, Cambridge, (1981). Therefore the Examiners statement is incorrect after the application of the only electric field intensity in Pons, and the first electric field intensity in the present application.

In summary, the subject matter of Applicant's invention, '765, does not read on the Examiner's cited art which are not the same as a two-stage process involving loading of hydrogen into a metal electrode such as palladium, including a first stage of electrode loading, followed by, a second stage of sudden rapid ('catastrophic') flow of the loaded hydrogen within the metal and means to extract product using magnetic field inhomogeneity, based differential magnetic susceptibilities, as taught in the above-entitled patent application.

95. Claims 1, 2, 4, 5, 7, 10, 13, 15 and 16 and 21 have been rejected under 35 U.S.C. 102 (b) as being anticipated by Kinsella (U.S. 3,682, 806). As discussed below, the Applicant demonstrates that said rejection is an error. This was discussed in the previous Communication with the Examiner on pages 33 through 37 and page 39. The Applicant thanks the Examiner for his response to a few of the comments (and they are addressed below), but where is the Examiner's substantive response to the rest?

Where is the Examiner's response to the Applicant's other arguments?

Kinsella was again discussed by Applicant in the Communication of Applicant dated 5/5/03 including therein on pages 20-27. Where is the Examiner's substantive response?

Instead, the Examiner once again, has inadvertently or unintentionally just unfairly asked the same question. As a result, many of the corrections below are made again because the Examiner is disingenuous and has failed to reply in detail, precisely and substantively to what the Applicant previously stated. Therefore, notwithstanding the above, as discussed below, the Applicant demonstrates that said rejection is an error. Applicant's scientific criticisms are serious, and the Examiner is requested to please address the Applicant's comments.

Kinsella --as it claims-- is simply a process for electroplating metallic articles with carboxylic film-forming materials in a process utilizing lithium hydroxide as solubilizer (see Fig. 1 and column 8, 2nd paragraph). Kinsella demonstrates the most rudimentary of an electroplating process and it does not have the purpose, advanced technology, features, and advantages of the present invention. Kinsella, uses a stainless steel cathode, and only a one stage process. Kinsella uses no loading, or has no features of the present application. Corroborating this, from Kinsella, the Examiner quotes that 'Fig. 1 shows the anode (4), which is the material to be coated, a stainless steel cathode (6)'. Furthermore, as additional further proof in Kinsella the text explicitly states, as the Examiner quotes 'An alternative embodiment can have an auxiliary platinum anode (7) and an auxiliary stainless steel cathode (8)'. Kinsella leads away from the present invention as it uses a cationic membrane to divide the cathodic compartment (number 1 in Kinsella, column 9 line 65), a regenerated ion exchange resin (column 10 line 14), a auxiliary platinum anode ("7", column 10 line 15), a selective electrodialysis membrane to contain ion exchange resin ("9" and "12", column 10 lines 19-23), and a solubilized feed makeup material introduced to the anode ("11", column 10 line 11), which are not needed in the present invention, as described in the original specification and claims.

Thus, the present invention, unlike Kinsella which uses methods well known to those who work in the art, is not an electroplating process of carboxylic film-forming materials, but in the preferred embodiment is a two-stage process involving loading of hydrogen into a metal electrode such as palladium, including a first stage of electrode loading, followed by, a second stage of sudden rapid ('catastrophic') flow of the loaded hydrogen within the metal. The present invention uses a two-stage process, loading of hydrogen, a metal electrode such as palladium, a first stage of electrode loading, and a second stage of sudden rapid ('catastrophic') flow of the loaded hydrogen within the metal, for purposeful reasons, which are clearly different from the carboxylic film-forming processes described in Kinsella.

96. The Office states,

*"(The Applicant previously said) ' Kinsella recites features that are not-needed in the claimed invention. .... Kinsella does not have the purpose, advanced technology, features and advantages of the claimed invention. These are immaterial because the claims define the invention and the claims are the ones examined for patentability. The examiner has shown that Kinsella's process and apparatus read on the applicant's claims, and therefore, Kinsella anticipates the applicant's claims.*

#### **THE TRUTH -Different Inventions, Different Claims**

The Examiner is incorrect and disingenuous. Kinsella is nothing like the present invention.

This statement by the examiner is minimizes the scope of the differences between Kinsella and the present invention. In the present invention, Figure 7 of the original specification, absolutely shows features which are not found in Kinsella. For example, attention is directed to the four concentric components of the device surrounding the cathode, in coaxial fashion, including the deuteron diffusion barrier (labeled 50) and the expansion barrier (labeled 40). Where are they in Kinsella? Attention is directed to the heavy water-LiOD-gel, labeled 6. Where is it in Kinsella? Attention is directed to the device in Figure 7 shaped like a fuse, which "can be easily placed into, or removed from, an assembly and system". Where is it in Kinsella?

In the present invention, Figure 8 shows features which are not found in Kinsella. For example, attention is directed to the centrally placed axially-filled cathode, the coaxial deuteron-barrier, the coaxial expansion-barrier. Where are they in Kinsella? Attention is directed to the structural support system (labeled 20), the expansion barrier (labeled 40), and the deuteron impermeable barrier (labeled 50). Where are they in Kinsella?

In the present invention, Figure 9 shows features which are not found in Kinsella. Attention is directed to the cluster of seven CAM devices, with their external structural casing support system and intercluster thermomechanical material. Where are they in Kinsella?

In the present invention, Figure 10 shows features which are not found in Kinsella. Attention is directed to the central axially-filled cathode, the two coaxial deuteron-barriers inner thermal pipe, and the structural support system labeled 20. Attention is also directed to the inner thermal barrier labeled 70, the outer deuteron barrier labeled 50, and the barrier to expansion is labeled 20. Exactly where are any of these in Kinsella? In the present invention, Figure 10 shows four layers (from inner to outer) which in the preferred embodiment are made of diamond filament, gold, palladium, and gold. Where are they in Kinsella?

In the present invention, Figure 11 shows features which are not found in Kinsella. For example, attention is directed to the coaxially-filled cathode, the inner coaxial deuteron-barrier and thermal pipe in a cylindrical configuration, the electric fields in the radial direction, and the anode which is circumferential to the cathode [labeled 7]. Where are they in Kinsella? Figure 11 shows solution (labeled 6) which consists of lithium deuteroxide, palladium deuteroxide, and heavy water as the preferred embodiment. Where is it in Kinsella?

In the present invention, Figure 12 shows features which are not found in Kinsella. attention is directed to the three CAM devices (labeled as 90), the intradevice gel containing lithium and palladium deuteroxide (labeled 6), the device receptor apparatus (labeled 93 in figure 12), the electrical and thermal connectors (labeled 96, and 97 respectively), the mechanical connecting system (labeled 94), the heat dissipative radiator (labeled 95), and the three cathodic connectors are connected to the control apparatus. Where is it in Kinsella? Figure 12 shows CAM devices which are inserted, similar to a fuse onto a holding board (labeled 91) held in place by clips (labeled 92). Exactly where are any of these in Kinsella?

In the present invention, Figure 13 shows features which are not found in Kinsella. For example, attention is directed to the lamellar CAM reactor, the two orthogonal applied electric fields, the connections for the first electric field labeled as 81 and 82, the connections for the second electric field labeled as 85 and 86, the mechanical casing labeled 20, and the deuteron impermeable barrier which is comb-shaped in this preferred configuration, and is labeled 55 in Figure 13. Exactly where are any of these in Kinsella?

In the present invention, Figure 14 shows features which are not found in Kinsella. For example, attention is directed to the three lamellar CAM reactors labeled as 90 in figure 14, and the intradevice gel containing lithium and palladium deuterioxide (labeled 6), and anode (labeled 7) held in place by clips (labeled 102), the electrical bus to connect the anodes (labeled 105) which are connected to the anodic connectors (labeled 82), and the electrical bus which connects the cathodes (labeled 106 and 107). Where are these in Kinsella? Attention is also directed to the thermal bus (labeled 107) connected to the heat pipes (labeled 70) which are held in a mechanical connecting system (labeled 20), the deuteron-impermeable barriers (labeled 55 in figure 14), the heat pipes (70) and the thermal bus (107). Are any of these in Kinsella?

In the present invention, Figure 15 shows features which are not found in Kinsella. For example, attention is directed to the mechanical casing labeled 20, the deuteron impermeable barrier labeled 55, and the external structures labeled 110 and 120, circumferential to the casing (20) which are used to squeeze the CAM reactor. Where are they in Kinsella?

In the present invention, Figure 16 shows features which are not found in Kinsella. Attention is directed to the three pressure-activated CAM reactors, the heat pipes (labeled 70), the expansion barrier (40), the deuteron diffusion barrier (labeled 50), the external casing (20), the thermomechanical connector (labeled 130), the external thermal bus (140), holding board (150, 151 above and below the assembly), and the external structures labeled 110 and 120 near-circumferential. Where are they in Kinsella?

In the present invention, Figure 17 shows features which are not found in Kinsella. For example, attention is directed to the transistor-like header (labeled as 200). Where is this in Kinsella? Attention is directed to the perforated by six (6) holes accommodate insulators (labeled 210), the six electric leads (182, 185, 181, and 186), and two thermal connections (labeled 170 in figure 17). Where are they in Kinsella?

In the present invention, Figure 18 shows features which are not found in Kinsella. For example, attention is directed to the extraction of isotopic nuclear fusion product (e.g. tritium) by an axially loaded cathode (labeled 1; anode is labeled 7) using an inhomogeneous magnetic field intensity applied by coil labeled 300 to one portion of the cathode (1). Where is any of this in Kinsella?

**NOTA BENE:** The materials described in Kinsella do not have the properties of the materials described in the present invention.

The methods described in Kinsella are not the methods described in the present invention.

Corroborating this, attention is directed to the fact that the following elements shown in Kinsella are not present, or needed, or claimed in the present invention. Said unneeded elements numbered in Kinsella as 1 (cationic membrane to divide the cathodic compartment (column 9 line 65), 7 (a auxiliary platinum anode (column 10 line 15), 9 (a selective electrodialysis membrane to contain ion exchange resin (column 10 lines 19-23), and 11 (a solubilized feed makeup material introduced to the anode (column 10 line 11) are not needed in the present invention, as the described in the original specification and claims, thereby proving the present invention has significant novelty and non-obviousness.

The present invention is novel and not anticipated by Kinsella. Nowhere in Kinsella is any aspect of the features of '765. The materials described in Kinsella do not have the properties of the materials described in the present invention. The methods described in Kinsella are not the methods described in the present invention. Furthermore, if the materials and elements used in Kinsella, here the cationic membrane to divide the cathodic compartment (number 1 in Kinsella, column 9 line 65), a regenerated ion exchange resin (column 10 line 14), a auxiliary platinum anode ("7", column 10 line 15), a selective electrodialysis membrane to contain ion exchange resin ("9" and "12", column 10 lines 19-23), and a solubilized feed makeup material introduced to the anode ("11", column 10 line 11), as suggested by the examiner, were to be used in the present invention, they would not function. Similarly, if the present invention, '765, was used as described in Kinsella, it would not be functional.

97. The Office states,

*"(The Applicant previously said) 'Kinsella loads outside the metal instead of inside the metal. in the claimed invention Kinsella discloses a material containing Zr and/or Ta, which can be loaded from the inside. Applicant himself admits this as a well-known scientific fact by his claims.'"*

**THE TRUTH Loading is Different from Crystal Growth**

The Office is disingenuous again. First, Applicant has said much about contamination issues to which the Examiner near-endlessly inaccurately points.

Second, even the currents are handled differently. The patent teaches the loading current is into the volume of the cathode in contrast to the cited patent in Kinsella, the loading current is onto the surface of the cathode in contrast to the cited patent which loads the volume for different purpose. Kinsella electroplates metallic articles with carboxylic films (column 8, 2nd paragraph). Unlike the present invention where there is a specialized palladium (or other hydrogen loading) cathode, in Kinsella, there is only a stainless steel cathode. Corroborating this, from Kinsella, the Examiner quotes that 'Fig. 1 shows the anode (4), which is the material to be coated, a stainless steel cathode (6)'. Furthermore, as additional further proof in Kinsella the text explicitly states, as the Examiner quotes 'An alternative embodiment can have an auxiliary platinum anode (7) and an auxiliary stainless steel cathode (8)'.

Third, further corroborating this, attention is directed to the fact that Kinsella leads away from the present invention as it uses a cationic membrane to divide the cathodic compartment (number 1 in Kinsella, column 9 line 65), a regenerated ion exchange resin (column 10 line 14), a auxiliary platinum anode ("7", column 10 line 15), a selective electrodialysis membrane to contain ion exchange resin ("9" and "12", column 10 lines 19-23), and a solubilized feed makeup material introduced to the anode ("11", column 10 line 11) which are not needed in the present invention, as the described in the original specification and claims. This proves that the present invention has significant novelty and non-obviousness. Fourth, attention is again directed to the fact that in Kinsella, unlike the present invention where there is a specialized palladium (or other hydrogen loading) cathode, in Kinsella, there is only a stainless steel cathode, only a one stage process, no loading, and no features of the present application.

98. The Office states,

*"(The Applicant previously said) 'Kinsella uses a stainless steel cathode, uses no loading and does not have a two-stage process. .. Stainless steel can have a composition that contains Zr - (Group IVb metal) and/or Ta (Group Vb metal) both of which are suitable loading" materials as per claims 2 and 15. The second applied electric provides the second stage of the process."*

**THE TRUTH - Contamination Quantities are Insufficient**

The Examiner is incorrect for many reasons. First, contamination quantities are never available in sufficient quantities is the examiner purports. Second, metal diffusion rates from inside metals are well-known are not sufficient to produce quantities of materials as the examiner unscientifically alleges.

Furthermore, the examiner is not truthful. Kinsella is not a two-stage process. '765 teaches and claims a two-stage process involving loading of hydrogen into a metal electrode such as palladium, including a first stage of electrode loading, followed by, a second stage of sudden rapid ('catastrophic') flow of the loaded hydrogen within the metal.

By contrast, Kinsella's process is for the purpose of electroplating metallic articles with carboxylic films.

99. The Office states that Kinsella reads on,

*"Note that applicant's 'isotopic fuel' in the claim language reads on Kinsella et OH's lithium anions that form on the anode, 'material' reads on 'anode', 'loading of isotopic fuel into material' reads on the 'electrodeposition current' and its effect 'change in the active quantity of isotopic fuel within material' reads on the 'regeneration current' and its effect"*

**THE TRUTH - Electrodeposition Current Is Not The Loading Current**

The material of Applicant's invention, '765, does not read on Kinsella's electroplating process using carboxylic film-forming materials, as the Examiner suggests. Kinsella's invention is an electroplating process carboxylic film-forming materials which cannot be the same as a two-stage process involving loading of hydrogen into palladium. Kinsella --as it claims-- processes carboxylic film-forming materials with lithium hydroxide as solubilizer (see Fig. 1 and column 8, 2nd paragraph). This cannot read on the hydrogen of the present patent because the applicant uses hydrogen as the loaded material. In addition, the 'anode' of Kinsella cannot be the 'material' because in the present patent, it is cathodically controlled and used for a different purpose.

The 'electrodeposition current' cannot read on 'loading of isotopic fuel into material' because in Kinsella, unlike the present invention where there is a specialized palladium (or other hydrogen loading) cathode, there is only a stainless steel cathode (6). Furthermore, Kinsella uses a cationic membrane to divide the cathodic compartment (number 1 in Kinsella, column 9 line 65), a regenerated ion exchange resin (column 10 line 14), a auxiliary platinum anode ("7", column 10 line 15), a selective electrodialysis membrane to contain ion exchange resin ("9" and "12", column 10 lines 19-23), and a solubilized feed makeup material introduced to the anode ("11", column 10 line 11) which are not needed in the present invention, or used therein for the purposes which Kinsella states. This proves that the present invention has significant novelty and non-obviousness.

Kinsella's invention which is an electroplating process carboxylic film-forming materials is not the same as a two-stage process involving loading of hydrogen into palladium discussed in the present invention's original specification and claims. '765 reads on a two-stage process involving loading of hydrogen into a metal electrode such as palladium, including a first stage of electrode loading, followed by, a second stage of sudden rapid ('catastrophic') flow of the loaded hydrogen within the metal.

100. The Office states,

*"Claims 1-8 and 13-16 are rejected under 35 U.S.C. 102(b) as being anticipated by Patterson (US 5,318,675) or Patterson (US 5,372,688)."*

**THE TRUTH - The Present Application is a Continuation of an Application filed in 1991**

As discussed below, the Applicant demonstrates that said rejection remains a salient error. Applicant respectfully notes that this was discussed in the previous Communication with the Examiner on pages 23 through 28 and page 39. The Applicant thanks the Examiner for his response to a few of the comments (and they are addressed below), but where is the Examiner's substantive response to the rest? Where is the Examiner's response to the Applicant's other arguments? Instead, the Examiner once again, has inadvertently or unintentionally asked the same question. As a result, many of the corrections below are made again because the Examiner has failed to reply in detail, precisely and substantively to what the Applicant previously stated. [Notwithstanding the above, as discussed below, the Applicant demonstrates that said rejection is an error. Applicant's scientific criticisms are serious, and the Examiner is requested to please address the Applicant's comments.]

101. The Office states,

*"(The Applicant previously said) 'The application was filed prior to Patterson ('675) and Patterson ('688) Patterson ('6 75J has a priority date of June 7, 1994 and Patterson ... Both were fled more than one year prior to the 12/28/00 fling date for the current application."*

**THE TRUTH - The Present Application is a Continuation of an Application filed in 1991**

This statement by the examiner is false.

The applicant notes that the application '970 -of which the present invention '765 is a continuation of- was filed September 17, 1991, prior to Patterson-1,2. In addition it precedes the filing date of Patterson-1,2. Nonetheless *in arguendo*, the applicant will now discuss Patterson-1,2 in full detail to demonstrate that even if they were timely, they are not relevant to the present novel invention which is not anticipated by the cited art, Patterson-1,2. Nowhere in Patterson-1,2, or in any combination of the Examiner's art, are any aspect of the features of '765.

102. The Office states,

*"(The Applicant previously said) "'Patterson is not the same as the claimed invention. The examiner has shown how Patterson's process and apparatus read on the applicant's claims, and therefore, the Patterson patents anticipate file applicant's claims."*

**THE TRUTH - These are Different Patents with Different Features and Parts**

This statement by the examiner is false. This statement by the examiner is minimizes the scope of the differences between Patterson and the present invention. In the present invention, Figure 7 of the original specification, absolutely shows features which are not found in Patterson. For example, attention is directed to the four concentric components of the device surrounding the cathode, in coaxial fashion, including the deuteron diffusion barrier (labeled 50) and the expansion barrier (labeled 40). Where are they in Patterson? Attention is directed to the heavy water-LiOD-gel, labeled 6. Where is it in Patterson? Attention is directed to the device in Figure 7 shaped like a fuse, which "can be easily placed into, or removed from, an assembly and system". Where is it in Patterson?

In the present invention, Figure 8 shows features which are not found in Patterson. For example, attention is directed to the centrally placed axially-filled cathode, the coaxial deuteron-barrier, the coaxial coaxial expansion-barrier. Where are they in Patterson? Attention is directed to the structural support system (labeled 20), the expansion barrier (labeled 40), and the deuteron impermeable barrier (labeled 50). Where are they in Patterson?

In the present invention, Figure 9 shows features which are not found in Patterson. Attention is directed to the cluster of seven CAM devices, with their external structural casing support system and intercluster thermomechanical material. Where are they in Patterson?

In the present invention, Figure 10 shows features which are not found in Patterson. Attention is directed to the central axially-filled cathode, the two coaxial deuteron-barriers inner thermal pipe, and the structural support system labeled 20. Attention is also directed to the inner thermal barrier labeled 70, the outer deuteron barrier labeled 50, and the barrier to expansion is labeled 20. Exactly where are any of these in Patterson? In the present invention, Figure 10 shows four layers (from inner to outer) which in the preferred embodiment are made of diamond filament, gold, palladium, and gold. Where are they in Patterson?

In the present invention, Figure 11 shows features which are not found in Patterson. For example, attention is directed to the coaxially-filled cathode, the inner coaxial deuteron-barrier and thermal pipe in a cylindrical configuration, the electric fields in the radial direction, and the anode which is circumferential to the cathode [labeled 7]. Where are they in Patterson? Figure 11 shows solution (labeled 6) which consists of lithium deuterioxide, palladium deuterioxide, and heavy water as the preferred embodiment. Where is it in Patterson?

In the present invention, Figure 12 shows features which are not found in Patterson. attention is directed to the three CAM devices (labeled as 90), the intradevice gel containing lithium and palladium deuterioxide (labeled 6), the device receptor apparatus (labeled 93 in figure 12), the electrical and thermal connectors (labeled 96, and 97 respectively), the mechanical connecting system (labeled 94), the heat dissipative radiator (labeled 95), and the three cathodic connectors are connected to the control apparatus. Where is it in Patterson? Figure 12 shows CAM devices which are inserted, similar to a fuse onto a holding board (labeled 91) held in place by clips (labeled 92). Exactly where are any of these in Patterson?

In the present invention, Figure 13 shows features which are not found in Patterson. For example, attention is directed to the lamellar CAM reactor, the two orthogonal applied electric fields, the connections for the first electric field labeled as 81 and 82, the connections for the second electric field labeled as 85 and 86, the mechanical casing labeled 20, and the deuteron impermeable barrier which is comb-shaped in this preferred configuration, and is labeled 55 in Figure 13. Exactly where are any of these in Patterson?

In the present invention, Figure 14 shows features which are not found in Patterson. For example, attention is directed to the three lamellar CAM reactors labeled as 90 in figure 14, and the intradevice gel containing lithium and palladium deuterioxide (labeled 6), and anode (labeled 7) held in place by clips (labeled 102), the electrical bus to connect the anodes (labeled 105) which are connected to the anodic connectors (labeled 82), and the electrical bus which connects the cathodes (labeled 106 and 107). Where are these in Patterson? Attention is also directed to the thermal bus (labeled 107) connected to the heat pipes (labeled 70) which are held in a mechanical connecting system (labeled 20), the deuteron-impermeable barriers (labeled 55 in figure 14), the heat pipes (70) and the thermal bus (107). Are any of these in Patterson?

In the present invention, Figure 15 shows features which are not found in Patterson. For example, attention is directed to the mechanical casing labeled 20, the deuteron impermeable barrier labeled 55, and the external structures labeled 110 and 120, circumferential to the casing (20) which are used to squeeze the CAM reactor. Where are they in Patterson?

In the present invention, Figure 16 shows features which are not found in Patterson. Attention is directed to the three pressure-activated CAM reactors, the heat pipes (labeled 70), the expansion barrier (40), the deuteron diffusion barrier (labeled 50), the external casing (20), the thermomechanical connector (labeled 130), the external thermal bus (140), holding board (150, 151 above and below the assembly), and the external structures labeled 110 and 120 near-circumferential. Where are they in Patterson?

In the present invention, Figure 17 shows features which are not found in Patterson. For example, attention is directed to the transistor-like header (labeled as 200). Where is this in Patterson? Attention is directed to the perforated by six (6) holes accommodate insulators (labeled 210), the six electric leads (182, 185, 181, and 186), and two thermal connections (labeled 170 in figure 17). Where are they in Patterson?

In the present invention, Figure 18 shows features which are not found in Patterson. For example, attention is directed to the extraction of isotopic nuclear fusion product (e.g. tritium) by an axially loaded cathode (labeled 1; anode is labeled 7) using an inhomogenous magnetic field intensity applied by coil labeled 300 to one portion of the cathode (1). Where is any of this in Patterson?

The Examiner should also address the fact that Patterson uses a pump (18 in Patterson; column 3 line 11), reservoir (32; column 3 line 12), slide valve (22; column 3 line 24), second slide valve (30; column 3 line 25), test reservoir (34; column 3 line 26), inlet and outlet stoppers (54 and 56; column 3 line 39-40), conductive palladium coated microsphere (36; column 3 line 54, and column 4 lines 41 through 60), a "conductive (sic) foraminous grid" (38; column 3 line 56) which do not even exist in the present invention.

103. The Office states,

*"(The Applicant previously said) 'The claimed invention minimizes electrolysis unlike Patterson, the claimed invention methodically controls temperature unlike Patterson, and there are some reduction in accuracies in the experimental results from Patterson's inventions. The features cited by the Applicant are non-limiting because they not recited in the claims.*

**THE TRUTH -Patterson Does Not Involve A Catastrophic Diffusion Flux**

This statement by the examiner is false for many reasons. Applicant also respectfully notes that this was discussed in the previous Communication with the Examiner on pages 23 through 28 and page 39. Where is the Examiner's response to the arguments?

Patterson was again discussed by Applicant in the Communication of Applicant dated 5/5/03 including therein on pages 27-34. Where is the Examiner's substantive response?

First, actually, the issue of minimizing electrolysis is in the claims of the another of Applicant's inventions to which he does refer [976]. Second, Patterson strives for "electrolysis" as the titles, description and claims of Patterson 1, and 2 admit. However, it is NOT desired in the present invention which is operated through control of the optimal operating points (infra).

Third, the present invention does claim a change in loading after intial loading. Patterson does not have a change in the loading after loading because the Office would have cited it. In fact, the Office admits to a precharging phase,

*"Patterson refers to .. a "loading stage" during which a relatively low level current (0.05 amps) is introduced across the electrodes 15 and 16. During the initial loading, palladium surface of the microspheres (36) Any absorbs and combines with the hydrogen isotope, i.e., it becomes loaded. This loading takes about two hours under a current flow through the cell of about 0.05 amps (e.g., see column 6, lines 6+)."*

Fourth, the features of the present invention ARE recited in the claims. Patterson's invention which is a simple electrolytic cell consisting of beads is not the same as a two-stage process of the present invention's original specification and claims. '765 reads on a two-stage process involving loading of hydrogen into a metal electrode such as palladium, including a first stage of electrode loading, followed by, a second stage of sudden rapid ('catastrophic') flow of the loaded hydrogen within the metal. The material of Applicant's invention, '765, does not read on Patterson's a simple electrolytic cell consisting of beads, as the Examiner inaccurately states.

104. The Office states that Patterson reads on,

*"Following the loading stage, the current level between electrodes 15 and 16 is then incrementally increased. During this time, the temperature of the electrolyte is both monitored and controlled by increasing the flow rate of electrolyte (59) therethrough (see column 6, lines 1+)."*

*"Note that the palladium-coated microspheres are immersed in the electrolyte and any change in the electrolyte temperature inherently changes the temperature of the material."*

**THE TRUTH - Controlling temperature of the electrolyte is NOT the same as this invention**

The material of Applicant's invention, '765, does not read on Patterson's a simple electrolytic cell consisting of beads, as the Examiner falsely suggests.

First, controlling temperature of the electrolyte for flawed flow calorimetry is NOT the same as methodically controlling device temperature. Patterson's invention uses a flow calorimetric system. Patterson uses his pump (18 in Patterson; column 3 line 11), reservoir (32; column 3 line 12), slide valve (22; column 3 line 24), second slide valve (30; column 3 line 25), test reservoir (34; column 3 line 26), inlet and outlet stoppers (54 and 56; column 3 line 39-40) to effect temperature for different purpose, and by different process than the present invention.

Second, in Patterson, there is temperature is control through the flow rate of electrolyte through rudimentary beads. Corroborating this, Patterson admits that the temperature of the electrolyte is both monitored and controlled by increasing the flow rate of electrolyte (59) therethrough (see column 6, lines 1+).

Third, attention is directed to the fact that in Patterson, unlike the present invention, there is temperature is control through the flow rate of electrolyte as opposed to the catastrophic method covered in the present invention, and uses a simple two electrode system with rudimentary beads.

105. The Office states that Patterson discloses,  
*"Either one of Patterson-1 or Patterson-2 discloses in Fig. 2 an electrolytic cell (12) filled with a liquid electrolyte (59) of heavy water, and having electrodes 15 and 16. "*

#### **THE TRUTH - The Inventions are Totally Different**

Actually, the inventions are vastly different. Patterson discloses an electrolytic cell consisting of cathodic beads located in a flow calorimetric system. Patterson's invention is a simple electrolytic cell consisting of beads and Patterson claims said rudimentary electrolytic cell filled with beads of mixed metals, arranged as cathodic beads, with the entire aggregation of beads then located in a flow calorimetric system. This is discussed in Patterson and Cravens 5,607,563 "System for Electrolysis", hereinafter Patterson-3. Thus, Patterson uses a pump (18 in Patterson; column 3 line 11), reservoir (32; column 3 line 12), slide valve (22; column 3 line 24), second slide valve (30; column 3 line 25), test reservoir (34; column 3 line 26), inlet and outlet stoppers (54 and 56; column 3 line 39-40), conductive palladium coated microsphere (36; column 3 line 54, and column 4 lines 41 through 60), a "conductive (sic) foraminous grid" (38; column 3 line 56).

Furthermore, Patterson strives for "electrolysis" as the titles, description and claims of Patterson 1, and 2 admit.

In addition, and thus, Patterson --as it claims-- is simply an electrolytic cell consisting of cathodic beads located in a flow calorimetric system. Patterson demonstrates the most rudimentary electrolytic cell and does not have the advanced technology, features, and advantages of the present invention. Patterson includes none of the features of the present invention. The methods described in Patterson are not the methods described in the present invention. The apparatus described in Patterson has none of the properties of the apparatus described in the present invention. Therefore, Patterson is not the same as a two-stage process involving loading of hydrogen into palladium discussed in the present invention's original specification and claims.

By contrast, the present invention is not a simple electrolytic cell consisting of beads, but in the preferred embodiment, a two-stage process involving loading of hydrogen into a metal electrode such as palladium, including a first stage of electrode loading, followed by, a second stage of sudden rapid ('catastrophic') flow of the loaded hydrogen within the metal. This is the opposite of Patterson. In addition, by contrast, the present invention minimizes electrolysis, exactly the opposite of Patterson-1, 2, and 3.

This present invention is novel and not anticipated by Patterson 1 or 2 or 3. If the present invention, '765, was used as described in Patterson, it would not even work.

106. The Office states that Patterson reads on,  
*"Note that applicant's claim language of 'producing a change in the active quantity of isotopic fuel in material by a change in temperature of the material' reads on either Patterson-1's or Patterson-2's process of 'controlling the electrolyte temperature by changing the flow rate.'"*

**THE TRUTH - Patterson controlling flow rate to control temperature involves Patterson's temperature measurement vs. this Inventions Method**

The Examiner ignores that Patterson is NOT this invention, and that controlling an electrolyte temperature is not changing with control the temperature of a loaded metal after loading. The Examiner has now broached dishonesty. Patterson discloses an electrolytic cell consisting of cathodic beads located in a flow calorimetric system. Patterson uses a pump (18 in Patterson; column 3 line 11), reservoir (32; column 3 line 12), slide valve (22; column 3 line 24), second slide valve (30; column 3 line 25), test reservoir (34; column 3 line 26), inlet and outlet stoppers (54 and 56; column 3 line 39-40), conductive palladium coated microsphere (36; column 3 line 54, and column 4 lines 41 through 60), a "conductive (sic) foraminous grid" (38; column 3 line 56). Patterson's invention is a simple electrolytic cell consisting of beads and Patterson claims said rudimentary electrolytic cell filled with beads of mixed metals, arranged as cathodic beads. Patterson strives for "electrolysis" as the titles, description and claims of Patterson 1, and 2 admit.

All of this is quite different from THIS INVENTION.

Although discussed in the previous communication from the Applicant, including on pages 23-28, the Examiner has minimized and ignored the critical errors of Patterson.

107. The Office states that Patterson discloses,  
*"A plurality of conductive microspheres (36) having a uniform outer palladium coating are positioned within the housing (14). See, for example, Patterson-1, column 3, lines 54+ and column 4, lines 21+."*

**THE TRUTH - ERROR - Patterson ignores Gauss' Law**

The Examiner ignores that Patterson is NOT this invention, and that Patterson ignored Gauss' Law. Patterson discloses an electrolytic cell consisting of agglomerated cathodic beads located in the center of a flow driven by a pump (18 in Patterson; column 3 line 11), using a reservoir (32; column 3 line 12). Examination of the electrostatics and electrodynamics of Patterson reveals that Gauss' Law was ignored in the flawed Patterson design because there will be no electric field intensity withing the out boundary of the conductive spheres (similar to a Faraday cage).

### **PATTERSON ERROR - ERROR - Vertical Calorimetric Error**

108. Patterson's numbers are in error because Patterson ignores and misinterprets thermal buoyancy. The Patterson microsphere-CETI system did not work at the superlative levels reported (ie. kilowatts). This was because it was designed to be a flawed vertical flow system [confer Swartz, M, "Potential for Positional Variation in Flow Calorimetric Systems", Journal of New Energy, 1, 126-130 (1996) and Swartz, M, "Improved Calculations Involving Energy Release Using a Bouyancy Transport Correction", Journal of New Energy, 1, 3, 219-221 (1996)]. There is a major potential error of vertical flow calorimetry - Bernard instability. Vertical low-flow calorimetry will give a false reading to anyone using it if Bernard instability [bouyancy factors] are ignored. Therefore, many scientists knowledgeable of the state-of-the-art prefer static calorimetry of uncalibrated vertical flow calorimetry such as Patterson uses.

In Patterson, the experimental setup is flawed in a way that diminishes its accuracy and utility. Simply put, Patterson ignores its dependance upon a vertical flow system and its magnification of the actual result when Bernard instability is not considered. Patterson's equation ignores the vertical buoyancy flow errors. Corroborating this indelibly, in Patterson-3, Table 1 reveals that the delta-T (row 1, column 7) is - 0.3. This cannot be correct because warm water always rises. Patterson should have used the zero amount to correct the output to derive a semiquantitative derived value from the observed instead of magnifying the output.

With Patterson, the invention is simple and flawed, and there is a failure of adequate calibration in the initial studies as the cited patent, Patterson-3, reveals. The result is that Patterson's data is flawed. The mere plugging of numbers into a formula does not necessarily mean that the derived value is accurate unless the formula(e) applies to the experimental setup. This was discussed in Swartz, M, "Potential for Positional Variation in Flow Calorimetric Systems", Journal of New Energy, 1, 126-130 (1996) and Swartz, M, "Improved Calculations Involving Energy Release Using a Bouyancy Transport Correction", Journal of New Energy, 1, 3, 219-221 (1996). Patterson has inaccurate data because it misinterpreted the amount of heat because of thermal buoyancy and Patterson's error of omission of considering it in Patterson's vertical flow system. In Patterson, the mere plugging of numbers into a formula used in a flawed way diminishes its derived value and accuracy.

In summary, attention is directed to the fact that in Patterson, unlike the present invention, there is temperature control through the flow rate of electrolyte as opposed to the catastrophic method covered in the present invention, and uses a simple two electrode system with rudimentary beads. '765 contains many additional critical features, components, etc., which are not found in Patterson or any of the other references. These features enable Applicant's invention to function differently from the cited references and to produce a different result.

### LAW

109 Applicant respectfully notes that this was discussed in the previous Communication but has not been addressed with specificity and precision. These patents are very different. They do not disclose a two-stage process involving loading of hydrogen into a metal electrode such as palladium, including a first stage of electrode loading, followed by, a second stage of sudden rapid ('catastrophic') flow of the loaded hydrogen within the metal of the cathode. The material of Applicant's invention, '765 does not read on the Examiner's cited art. Furthermore, it is improper to compare the cited art to the present invention for several reasons which the Applicant already discussed with the Examiner, but to which the Examiner has NOT yet completely and substantively responded. In particular, as to Section 102 rejections, it is stated in M.P.E.P. 706.2 that:

**'The distinction between rejections based on 35 USC 102 and those based on 35 USC 103 should be kept in mind. Under the former, the claim is anticipated (emphasis added) by the reference.**

In this same connection, The Court of Customs and Patent Appeals said in *In re Arkely, Eardley and Long*, 172 U.S.P.Q. 524, 526 (CCPA, 1972):

**'It is to be noted that rejections under 35 USC 103 are proper where the subject matter claimed 'is not identically disclosed or described' (emphasis by the Court) 'in the prior art,' indicating that rejections under 35 USC 102 are proper only when the claimed subject matter is identically disclosed or described in 'the prior art'.**

Therefore, given the above, the independent claims, and hence all claims, distinguish over the reference cited under Sec. 102. Thus, the present invention, a two-stage process involving loading of hydrogen into a metal electrode such as palladium, including a first stage of electrode loading, followed by, a second stage of sudden rapid ('catastrophic') flow of the loaded hydrogen within the metal, is novel, is not obvious, and does distinguish from all previous art. Given the above, the Examiner should be fair, should answer the Declarations, should thereby answer the previous Orders of the Board, and should answer with specificity all explicitly discussed issues herein and in the previously submitted but substantially ignored response, or after reconsideration with respect to novelty (Sec. 102), allowance is respectfully requested by the Applicant.

Given the above, the Examiner should be fair, should answer the Declarations, should thereby answer the previous Orders of the Board, and should answer with specificity all explicitly discussed issues herein and in the previously submitted but substantially ignored response, or after reconsideration with respect to novelty (Sec. 102), allowance is respectfully requested by the Applicant.

Given the above, reversal of Claims 1-10, 12-19, 21 and 22 are rejected under 35 U. S. C.102(b) with respect to novelty is respectfully requested by the Appellant.

### **Rejection Other Than Those Referred To In Paragraphs (c)(8)(i) to (iv)**

110. The Appellant hereby does fully and completely specify two groups of errors, other than those referred to in paragraphs (c)(8)(i) to (iv), which cause the rejection to be in error.

### **ARGUMENT - Rejections under 35 USC 101 REJECTION**

111. Claims 1-10, 12-19, 21, and 22 rejected under 35 U.S.C. 101 are rejected under 35 U.S.C. 101 by the Examiner, based upon flawed reference to other art ("FP" or "F+P") and by what appears to be the Examiner's ignoring said submitted Declarations of fact and accompanying Exhibits.

The appealed claims do not stand or fall together. Claims 1, 4, and 13 are separately patentable and do not stand or fall together because they are materially distinct with respect to 35 USC 101. Claims 1, 4, and 13 are separately patentable because they are not unduly multiplied, have separate limitations, and are required because the invention described by the original specification of the above-entitled application is very complex.

Claim 1 distinguishes and limits the invention, in a process for producing a product using a material which is electrochemically loaded with an isotopic fuel, to a method of controlling the loading which includes in combination, loading said isotopic fuel into said material, then providing means for producing a change in the quantity of said isotopic fuel within said material, creating thereby a catastrophic diffusion flux of said isotopic fuel within said material, providing a diffusion barrier to said diffusion flux of said isotopic fuel within said material, and thereby producing said product.

Claim 4 distinguishes and limits the invention, in a process using an isotopic fuel loaded into a material, to a two-stage method for controlling the loading which includes in combination loading said isotopic fuel into said material, then providing means for producing a change in the quantity of said isotopic fuel within said material, creating thereby a catastrophic diffusion flux of said isotopic fuel within said material.

Claim 13 distinguishes and further limits the invention to an apparatus to produce a product using a material loaded with an isotopic fuel, which includes in combination means to load said isotopic fuel into said material, means to produce a change in the quantity of said isotopic fuel within said material, means to produce a catastrophic diffusion flux of said isotopic fuel within said material, means thereby to produce said product.

The invention at issue in this case, '765, claimed by Claims 1-10, 12-19, 21, and 22 rejected under 35 U.S.C. 101, is generally speaking a two-stage process involving loading of hydrogen into a metal electrode such as palladium, including a first stage of electrode loading, followed by, a second stage of sudden rapid ('catastrophic') flow of the loaded hydrogen within the metal and means to extract product using magnetic field inhomogeneity, based on differential magnetic susceptibilities.

112. The Office states,

*"Claims 1-10, 12-19, 21, and 22 are rejected under 35 U.S.C. 101 because the claimed invention as disclosed is inoperative and therefore lacks utility".*

**THE TRUTH - Affiants' Statements are Fact and Support Utility**

This is incorrect as was discussed in the previous communication from the applicant to the examiner, dated 12/3/02. The utility of the present invention was discussed in the previous communication from the Applicant to the Examiner, dated 12/3/02, on pages 77 through 92. Where is the Examiner's substantive response? This was again discussed by Applicant in the Communication of Applicant dated 5/5/03 including therein on pages 99-1059. Where is the Examiner's substantive response?

The Examiner has ignored many of the Applicant's detailed Arguments.

The Examiner's Response is non-responsive to the submitted Declarations and *Amicus Curiae* Briefs which remain unrebutted and which corroborate both the "utility" of these teachings. In this case, as in S/N 07/760,970 and Federal Appeals Court 00-1108, the Office is disingenuous because the Office has ignored the many Declarants who affirm utility. Said affiants prove utility. It is a fact, apparently ignored and disliked by a hostile element within the US Patent Office which is determined to keep alternative energy from the United States, but it is a fact nonetheless which rebuts the erroneous opinion of the Office.

For example, the Examiner's Response is non-responsive to the Rotegard Declaration:

"If only a few labs had reported success, then skepticism of cold fusion would be viable. Several research teams reported positive finding on the original Fleischmann Pons effect at the Fourth International Conference on Cold Fusion in December 1993. I submit that Occams razor would dictate that the phenomena is real and has been "reproduced" to the point of overkill.

"Major research institutions, industrial corporations and established scientific journals of international repute have endorsed the reality of cold fusion and are acting to explore and benefit from this reality. \*\*\* These trends would lead a prudent person to conclude that there is substance to the research cited above. Therefore, developments and inventions in this area have great utility."

[Declaration of Dana R. Rotegard, 1994]

As another example, the Examiner's Response is non-responsive to the fact that Dr. McKubre stated:

**"For me, the best heat report, and perhaps the best report at this conference, was that of Mitch Swartz. ... I have not been able to perform the experiments myself, successfully, and I have always felt that the quality of the calorimetric observations in the nickel light water studies has been less than the quality of the calorimetric observations in the palladium-deuterium system. ... Mitch Swartz presented a very clear piece of calorimetric evidence which is certainly going to cause me to reconsider my belief and understanding of the nickel-light water system and its capacity to produce anomalous heat"**

**[Dr. Michael McKubre, SRI, Infinite Energy, 4, 20, pp.34-35, (1998)]**

As another example, the Examiner's Response is non-responsive to the fact that Dr. Michael Schaffer (A55, 8/7/01) said,

**"I do not see how anyone could construe anything that I wrote at Scientific American's site to imply that there is "no utility" in cold fusion, much less in instruments that might be used in cold fusion and other scientific experiments. ... As an expert ... I would agree [Dr. Swartz's invention] ... does have utility".**

The Examiner's Response is also non-responsive to the fact that Dr. Rehn, U.S. Navy, said

**"Perhaps the clearest scientific fact, at this time, is the hardest for physicists to accept: nuclear reactions apparently do occur in deuterium-loaded Pd, Ti, and probably in other solids."**

**[Office of Naval Research Asian Office, NAVSO P-3580, Vol. 18, Jan. 1993].**

This confirms that Dr. Will, another Office witness, said,

**"Significant positive results have been obtained (by) 100 groups from more than 12 countries"**

**[Final Report NCFI (1991)].**

The Examiner's Response is non-responsive to the fact that any source of more efficient energy, including controlled nuclear fusion, offers the possibility of an inexpensive source of energy for the United States and is of great utility. The original specification has explicitly indicated why there is great utility of both the field and the present invention. Energy needs dominate both the economy and welfare of humanity as has been shown historically. Therefore, this technology has great utility to society.

## **APPLICANT HAS PUBLICLY DEMONSTRATED HIS INVENTIONS**

113. The Applicant's system was demonstrated openly to the public at the Massachusetts Institute of Technology. It has been reported on in America, Europe Japan, and Asia. They came. The Patent Office's counsel was invited to attend the meeting and demonstration, but he did not show up.

For example, about the Applicant and his invention(s), are the following. These include excerpts from Appendix B by Dr. Mallove and Mr. Miranda, which also demonstrate the existence of the field in which the above-entitled invention operates.

"Here are some of the high points to be taken from ICCF10:

"Dr. Mitchell Swartz's Fleischmann/Pons-type electrolytic palladium Phusor/low electrolyte conductance heavy water/platinum cell performed flawlessly in Prof. Hagelstein's lab at MIT during ICCF10. Its excess power ranged from 167% to 267% as Dr. Swartz altered the experimental conditions. This excess heat, as measured by his precision calorimeter, persisted from Sunday August 24 to August 30, longer than ICCF10 itself. The excess heat was interrupted on the last day only to bring the equipment back to Wellesley, MA otherwise it would have continued much longer."

[Dr. Eugene Mallove, editorial, Appendix B  
*Infinite Energy Magazine* No.51, 9/2003]

As another example:

"Greetings. I am back from ICCF-10 but I have a rotten cold, so I am a decongestant daze. I can't even write. I write mainly by dictating to Naturally Speaking voice input, but the computer does not understand me when my nose is stuffed up.

"Swartz, and Dash et al., live demonstrations at MIT. Marvelous work! Bravo to everyone! McKubre said he would never have the guts to try this, because so much can go wrong when you move an experiment."

[Jed Rothwell, Subject: Impressions of ICCF-10, 3 Sep 2003]

As another example:

"Demonstrations - Three excess heat experiments were shown in live demonstrations at ICCF10, including two on August 26, in a laboratory at MIT that was open to the public: A cell in a precision calorimeter was shown by Mitchell Swartz and Gayle Verner at MIT."

[<http://lenr-canr.org/iccf10/iccf10.htm>]

As another example:

"... There was even a "field trip" from the hotel where the conference was held in Cambridge, to Room 568 in Building 36 at MIT where a live "overunity" (more-power-out-than-in) cold fusion experiment was hosted by Dr. Mitchell Swartz.

I learned first-hand at this conference that the very academic "cold fusion community" is far more interested in determining the physical and chemical equations in the languages they know than they are in understanding how the simple spark has enough energy in it to melt aluminum. They appear to go to great lengths to overcomplicate things, but that is understandable, since it conforms to the paradigms they are most accustomed to. .... Two names on the conference attendee list are from Toyota Central R & D. Labs. This was most encouraging, since Toyota funded Fleischmann and Pons in France after they were "run out of town" by the American Physical Society in 1989-1990."

[John Miranda, President  
Zer/Epoint®, Appendix B]

And yet as another example:

"La dixième conférence internationale sur la fusion froide ICCF10 s'est tenue à Boston aux Etats-Unis, du 24 au 29 août 2003. 120 personnes de 15 nationalités différentes y ont participé. Elle était organisée par le Professeur Peter Hagelstein, du MIT. Ce fut l'occasion de prendre connaissance des derniers développements sur le sujet. Depuis 10 ans que je travaille sur ce thème, et ayant participé à ma septième conférence, j'ai été très impressionné par la qualité du travail présenté, tant du point de vue expérimental que théorique. Elle s'est encore améliorée par rapport à ce qui avait été présenté l'an dernier à Pékin.

"Deux démonstrations de fusion froide ont été présentées : l'une par le professeur John Dash de l'université de l'Oregon à Portland, et l'autre par le Dr Mitchell Swartz. Les deux expériences ont démontré la production d'excès de chaleur.

"... M. Swartz a obtenu de forts excès de chaleur, jusqu'à 300% avec de l'eau lourde ultra pure de résistivité 220 k $\Omega$ , sans rajout d'électrolyte, avec cathode de palladium hélicoïdale. Des cycles de chargement et de déchargement accroissent l'excès de chaleur. Une remarque importante, est la forte tension mesurée en circuit ouvert : 2.5 Volts."

[Rapport sur L'International Conference on Cold Fusion ICCF10,

[http://users.skynet.be/kurtgode/iccf\\_10\\_biberian.htm](http://users.skynet.be/kurtgode/iccf_10_biberian.htm)]

## LAW

114. The Examiner's Response is non-responsive to the fact that he is incorrect and substantively contradicted Drs. Chubb, Fox, Mallove, McKubre, and by the Office's own previous witnesses, Dr. Rehn and Dr. Will. This is important because proof of utility should be judged either by those using the invention or those skilled in the art. Corroborating this, validation occurs when scientists actually skilled, and working, in the state-of-the-art state it to be so. These scientists who write the current scientific technical papers which undergo peer-review, file patent applications, and attend international conferences (which have gone on for thirteen years) and they absolutely disagree with the Examiner.

The Examiner's Response is non-responsive to the fact that utility is a fact question, and proof of utility is sufficient if it is convincing to one of ordinary skill in the art or if it meets at least one stated objective. Here it does. Unrebutted Declarations have been submitted in this case, and are again submitted, and the Examiner must respond to them substantively [Marino v. Hyatt Corporation; Morrill v. Tong; and Chelebda v.H.E. Fortuna & Brothers Inch]. Furthermore, the Examiner has rejected Marino v.Hyatt Corporation, 793 F.2d 427, 430 (1st Cir. 1986); Morrill v.Tong, 390 Mass. 1207 129 (1983); Chelebda v.H.E. Fortuna & Brothers Inch 609 F.2d 1022 (1st Cir. 1979); Lewis v. Bours, 119 Wn.2d 667, 670, 1992] which require the Examiner to assume that the Declarants' assertions are true. The Declarations demonstrate that the original specification and claims clearly define subject matter of considerable utility. Therefore, the Applicant has fully conformed with, and satisfied, the requirements of §101 of the Patent Act and met at least one (1) stated objective [Standard Oil Co. (Indiana) v.Montedison, S.P.A., 664 F.2d 356, 375, 212 USPQ 327, 344 (3rd Cir. 1981), cert. denied, 456 U.S. 915, 102 S.Ct. 1769, 72 L.Ed.2d 174 (1982); E.I. du Pont de Nemours & Co. v.Berkley & Co., 620 F.2d 1247, 1258 n.10, 1260 n.17, 205 USPQ 1, 8n10, 10n.17 (8th Cir. 1980); Krantz and Croix v.Olin, 148 USPQ 659, 661-62 (CCPA 1966); Chisum on Patents, 4.04[4] [1983]; RAYTHEON COMPANY v.ROPER CORPORATION, U.S.C.A., Federal Circuit, 1983, 724 F.2d 951, 220 USPQ 592].

115. The Examiner has not followed the standards of review. The Office's own rule [M.P.E.P. §2111.01] requires that "the words of a claim ... must be read as they would be interpreted by those of ordinary skill in the art". In this case, given the averments of so many, utility under USC 101 is clearly shown.

"Utility is a fact question, see e.g., *Wilden Pump v. Pressed & Welded Products Co.*, 655 F.2d 984, 988, 213 USPQ 282, 285 (9th Cir. 1981); *Nickola v. Peterson*, 580 F.2d 898, 911, 198 USPQ 385, 399 (6th Cir. 1978), cert. denied, 440 U.S. 961, 99 S.Ct. 1504, 59 L.Ed.2d 774 (1979)." [RAYTHEON COMPANY v. ROPER CORPORATION, U.S.C.A., Federal Circuit, 1983, 724 F.2d 951, 220 USPQ 592]]

"When a properly claimed invention meets at least one stated objective, utility under 101 is clearly shown. See e.g., *Standard Oil Co. (Indiana) v. Montedison, S.P.A.*, 664 F.2d 356, 375, 212 USPQ 327, 344 (3rd Cir. 1981), cert. denied, 456 U.S. 915, 102 S.Ct. 1769, 72 L.Ed.2d 174 (1982); *E.I. du Pont de Nemours & Co. v. Berkley & Co.*, 620 F.2d 1247, 1258 n. 10, 1260 n. 17, 205 USPQ 1, 8 n. 10, 10 n. 17 (8th Cir. 1980); *Krantz and Croix v. Olin*, 148 USPQ 659, 661-62 (CCPA 1966); *Chisum on Patents*, 4.04[4] [1983]." [RAYTHEON COMPANY v. ROPER CORPORATION, U.S.C.A., Federal Circuit, 1983, 724 F.2d 951, 220 USPQ 592]]

"Proof of utility is sufficient if it is convincing to one of ordinary skill in the art. In *re Irons*, 52 CCPA 938, 340 F.2d 974, 144 USPQ 351 (1965). The amount of evidence required depends on the facts of each individual case. In *re Gazave*, 54 CCPA 1524, 379 F.2d 973, 154 USPQ 92 (1967). The character and amount of evidence needed may vary, depending on whether the alleged utility appears to accord with or to contravene established scientific principles and beliefs. In *re Chilowsky*, 43 CCPA 775, 229 F.2d 457, 108 USPQ 321 (1956)."

[In *Re Jolles*, U.S.C.P.A., 1980. 628 F.2d 1322, 206 USPQ 885]

### **The Examiner Mistakes a Question of Fact for a Question of Law**

116. The Examiner's Response is non-responsive to the fact that the Examiner dismisses the affiants discussing Applicant's inventions as opinion. However, Declarants' statements and the peer-reviewed publications are Fact. The Examiner has mistaken a question of fact for a question of law. The Examiner cannot dismiss Declarations improperly to "opinion"-status without an adequate explanation of how the Declarations failed to overcome the prima facie case initially established by the Examiner. The Examiner has rejected *In re Alton* which requires that even the use of the words "it is my opinion" to preface what someone of ordinary skill in the art knows does not transform the factual statements contained in the declaration into opinion testimony. Exactly how many Declarants does it take to overcome the Examiner's unsubstantiated rejection?

117. The Examiner's Response is non-responsive to the fact that the Examiner has ignored the directive of 1.131 (a)(1) which requires that

**"When ... a patent ... is rejected .... on reference ... to a printed publication, the inventor of the subject matter of the rejected claim ... may submit an appropriate oath or declaration to overcome the patent or publication."**

The Examiner's Response is non-responsive to the fact that the Examiner has changed the standards of review.

The Examiner has rejected *In re Zurko* [142 F.3d 1447, 1449, 46 USPQ2d 1691, 1693 (Fed. Cir.), cert. granted, 119 S. Ct. 401 (1998)] which declares that utility is a fact question [*Raytheon Company V. Roper Corporation*, U.S.C.A., Federal Circuit, 1983, 724 F.2d 951, 220 USPQ 592], and one which the Examiner in this case must review for clear error [*Cross v. Iizuka*, 753 F.2d 1040, 1044 n.7, 224 USPQ 739, 742 n.7 (Fed. Cir. 1985); also *In re Zurko*].

*In re Irons* indicates that utility is a fact question [*Raytheon Company V. Roper Corporation*]. The submitted Declarations and the publications (including e.g. McKubre) are relevant as proof of utility. They demonstrate utility and operability at the time of the filing of this patent, and that it was, and is, important and of considerable utility.

The Examiner has rejected *In re Ziegler* [992 F.2d 1197, 1200, 26 USPQ2d 1600, 1603 (Fed. Cir. 1993)] which requires the Examiner accept Declarations as factual proof of utility.

The Examiner has rejected *In re Ferens* [417 F.2d 1072, 1074, 163 USPQ 609, 611 (CCPA 1969)] which heralds that Applicant's submitted evidence, including Declarations, is sufficient.

The Examiner has rejected *Ex parte Porter* which requires that Declarations, submitted in response to the Examiner's comments, must be read, examined, and carefully considered.

The Examiner has rejected *In re Morris* [127 F.3d 1048, 1053-56, 44 USPQ2d 1023, 1027-30 (Fed. Cir. 1997)] which demands that the interpretation of operability and utility is predicated upon that which one who is skilled-in-the-art would reach. The Examiner must give the claims their broadest reasonable interpretation consistent with that which those skilled-in-the-art would reach.

The Examiner has rejected *In re Oetiker* [977 F.2d at 1445, 24 USPQ2d at 1444] which requires the Examiner substantively and fully respond to the probative witnesses, because Applicant has undertaken the full burden coming forward.

The Examiner has rejected *Ex parte Gray* [10 USPQ2d 1922, 1928 (Bd. Pat. App. & Inter. 1989)] which allows for Applicant's submitted expert testimony regarding operability and utility, beyond the detailed specification. The Examiner must give substantial weight to said Declarations about what they said about this invention compared to the Examiner's art regarding the work of others.

The Examiner has rejected *In re Brana*, 51 F.3d at 1566, 34 USPQ2d at 1441] which indicates Applicant's actions hereby meet the "burden shift ... to provide rebuttal evidence sufficient to convince such a person of the invention's asserted utility".

The Examiner has rejected *In re Marzocchi* and *In re Oetiker* which require responsive argument to the fully addressed criticism against the Examiner's unfounded notions. *In re Marzocchi*, 439 F.2d 220, 223, 169 USPQ 367, 369 (CCPA 1971)] declares that the Examiner cannot make the rejection he has unless he has reason to doubt the objective truth of the statements contained in the written description, here corroborated and supported by multiple Declarations.

## **ADDITIONAL REASON OVERCOMING THE EXAMINER'S POSITION REGARDING USC 101**

### **Transformation for Inactive to Active is Patentable even without the Other Features**

118. Utility is a fact question, and proof of utility is sufficient if it meets at least one stated objective. Here it does - a two-stage process involving loading of hydrogen into a metal electrode such as palladium, including a first stage of electrode loading, followed by, a second stage of sudden rapid ('catastrophic') flow of the loaded hydrogen within the metal and means to extract product using magnetic field inhomogeneity, based on differential magnetic susceptibilities.

Furthermore, this necessarily involves transformation of a state or thing. Therefore, the Examiner has not followed the standards of review because such a two state method should be patentable based upon opinion of the Court.

**"Transformation and reduction of an article "to a different state or thing" is the clue to the patentability of a process claim that does not include particular machines."**

[GOTTSCHALK v. BENSON, 409 U.S. 63 (1972),  
409 U.S. 63, No. 71-485]

**"Industrial processes such as this ["a physical and chemical process (which involves) the transformation of an article .... into a different state or thing"] are the types which have historically been eligible to receive the protection of our patent laws. [450 U.S. 175, 185]"**

[DIAMOND v. DIEHR, 450 U.S. 175 (1981)]

## **ADDITIONAL REASON OVERCOMING THE EXAMINER'S POSITION REGARDING USC 101**

### **The Examiner Ignores Constitutional and Congressional Directive and Authority**

119. The Examiner has rejected the controlling authority of Art. I, §8, cl. 8 which provides that

**"Congress shall have Power (t)o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."**

Art. I, §8, cl. 8 empowers Congress in this matter.

The Examiner has rejected that the US Congress has mandated progress.

**"The patent laws (reflect) this Nation's deep-seated .... need to encourage progress:"**

[DIAMOND v. CHAKRABARTY, 447 U.S. 303 (1980),  
447 U.S. 303, No. 79-136]

The Examiner has rejected that the US Congress has mandated encouragement of science, and the Office's actions are inconsistent with the Patent Act of 1793, authored by Thomas Jefferson, which defined statutory subject matter as "any new and useful art, machine, manufacture, or composition of matter" Act of Feb. 21, 1793, 1, 1 Stat. 319, and with the Act which embodied Jefferson's philosophy that "ingenuity should receive a liberal encouragement." [447 U.S. 303, 309].

Given the facts stated above, and the fact the Office has granted patents to inventions of considerably less "utility" [e.g. Patent 3,580,592 or 3,450,403], any further rejection of the present invention on this arbitrary basis based upon such a presumed "non-utility" would appear to be both capricious, unwarranted, and unreasonable. As the original specification and claims teach, this two-stage process involving loading of hydrogen into a metal electrode such as palladium, including a first stage of electrode loading, followed by, a second stage of sudden rapid ('catastrophic') flow of the loaded hydrogen within the metal and means to extract product using magnetic field inhomogeneity, based on differential magnetic susceptibilities has many features of great utility.

The Examiner should admit that said features are not "incredible" but can be elicited when using the teachings of the original specification and claims. Furthermore, there is documented existence of these reactions and the preferred environment in which the present invention does operate. The number of papers in this field confirms both the "existence" and "utility" of these phenomena and any associated technologies.

120. In summary, the invention (structure, operation and composition) is defined by the claims and the original specification, and in this case they correctly define the invention, and if the teachings have been corroborated, and therefore there is enablement (a question of law; *In re Fouche*, 439 F.2d 1237, 1243, 169 USPQ 429, 434, (CCPA 1971)). Enablement, utility, and operability are grounds for patentability. In this case, the Applicant has set forth products and methods which have undergone peer-review, and Declarants and other affiants who have stated as fact that there is utility within the meaning of 35 U.S.C. 101 [*Brenner v. Manson*, 148 U.S.P.Q. 689].

Therefore, in this case, utility under 101 is clearly shown. Given the utility, Applicant respectfully requests reconsideration and reversal of the rejection of Claims 1-10, 12-19, 21, and 22 rejected under 35 U.S.C. 101.

Given the facts stated above, and the fact the Office has granted patents to inventions of considerably less "utility" [e.g. Patent 3,580,592 or 3,450,403], any further rejection of the present invention on this arbitrary basis based upon such a presumed "non-utility" would appear to be both capricious, unwarranted, and unreasonable. As the original specification and claims teach, the invention has features of great utility. The Examiner should admit that said features are not "incredible" but can be elicited when using the teachings of the original specification and claims. Furthermore, there is documented existence of these reactions and the preferred environment in which the present invention does operate. The number of papers in this field confirms both the "existence" and "utility" of these phenomena and any associated technologies.

121. Appellant asks the Board, because the Examiner and his supervisor both refused to answer the following question:

Exactly how many Declarants does it take to overcome the Examiner's [unsubstantiated] rejection regarding utility?

In summary, the invention (structure, operation and composition) is defined by the claims and the original specification, and in this case they correctly define the invention, and if the teachings have been corroborated, and therefore there is enablement (a question of law; *In re Fouche*, 439 F.2d 1237, 1243, 169 USPQ 429, 434, (CCPA 1971)). Enablement, utility, and operability are grounds for patentability. In this case, the Applicant has set forth products and methods which have undergone peer-review, and Declarants and other affiants who have stated as fact that there is utility within the meaning of 35 U.S.C. 101 [*Brenner v. Manson*, 148 U.S.P.Q. 689].

Therefore, in this case, utility under 101 is clearly shown. Given the utility, Appellant respectfully requests reversal of the rejection of Claims 1-10, 12-19, 21, and 22 rejected under 35 U.S.C. 101 pursuant to U.S.C. 101.

## CONCLUSION

122. The invention at issue in this case, '765, is claimed by Claims 1-10, 12-19, 21, and 22, and is generally speaking a two-stage process involving loading of hydrogen into a metal electrode such as palladium, including a first stage of electrode loading, followed by, a second stage of sudden rapid ('catastrophic') flow of the loaded hydrogen within the metal and means to extract product using magnetic field inhomogeneity, based on differential magnetic susceptibilities. Each of these features, and those of the original specification of which this is the divisional has obvious great utility. Thus, the claims of this application ['765, Claims 1-10, 12-19, 21, and 22] are respectfully submitted to be patentable over the cited references because:

i) the claims recite novel structure and thus are distinguished physically over every reference [Sec. 102], and

ii) said physical distinction effects new and unexpected results, thereby indicating that said physical distinction is unobvious [Sec. 103].

Claim 1 distinguishes and limits the invention, in a process for producing a product using a material which is electrochemically loaded with an isotopic fuel, to a method of controlling the loading which includes in combination, loading said isotopic fuel into said material, then providing means for producing a change in the quantity of said isotopic fuel within said material, creating thereby a catastrophic diffusion flux of said isotopic fuel within said material, providing a diffusion barrier to said diffusion flux of said isotopic fuel within said material, and thereby producing said product. Claim 4 distinguishes and limits the invention, in a process using an isotopic fuel loaded into a material, to a two-stage method for controlling the loading which includes in combination loading said isotopic fuel into said material, then providing means for producing a change in the quantity of said isotopic fuel within said material, creating thereby a catastrophic diffusion flux of said isotopic fuel within said material. Claim 13 distinguishes and further limits the invention to an apparatus to produce a product using a material loaded with an isotopic fuel, which includes in combination means to load said isotopic fuel into said material, means to produce a change in the quantity of said isotopic fuel within said material, means to produce a catastrophic diffusion flux of said isotopic fuel within said material, means thereby to produce said product.

Claims 1-10, 12-19, 21 and 22 are rejected under 35 U. S. C.102(b) as being anticipated by Westfall (US 5,215,631), Claims 1, 2, 4, 5, 7, 10, 13, 15, 16 and 21 are rejected under 35 U.S.C. 102(b) as being anticipated by Kinsella et al.(US 3,682,806), Claims 1-8 and 13-16 are rejected under 35 U.S.C.102(b) as being anticipated by Patterson (US 5,318,675) or Patterson (US 5,372,688), and all Claims 1-10, 12-19, 21, and 22 rejected under 35 U.S.C. 112 and 35 U.S.C. 101

The Office should issue the patent because Appellant taught in the original specification and claims how his apparatus works and claimed the invention. Appellant thereafter has made a diligent effort to amend the claims of this application so that Claims 1-10, 12-19, 21 and 22 define a novel structure which is also submitted to render said claimed structure unobvious because it produces new and unexpected results.

The Office should issue the patent because Appellant has herein demonstrated that any combination of the cited art is an improper one, absent any showing in the references themselves that they can or should be so combined, and that neither of the references appears to suggest, or allude to, or teach a structure as defined by the teachings of the original specification of the above-entitled application or claimed by Claims 1-10, 12-19, 21 and 22. Appellant has explained in detail (supra) how the other cited art are different and therefore produce a different result from the present invention. The figures and claims of the cited art are intended to, and do, serve a different purpose than does the structure defined by the claims, and each of the cited art adds nothing of substance. None of the cited references shows a two-stage process involving loading of hydrogen into a metal electrode such as palladium, including a first stage of electrode loading, followed by, a second stage of sudden rapid ('catastrophic') flow of the loaded hydrogen within the metal and means to extract product using magnetic field inhomogeneity, based on differential magnetic susceptibilities, as the Examiner purports.

The Office should issue the patent because Appellant has given lists of additional critical features and components which distinguish Applicant's invention to operatively function in a different manner compared to said cited art.

The Office should issue the patent not only because Applicant has met the standards of review, and not only because the Applicant has supported his work with both peer-reviewed publications and Declarations, but because the Office purports in its latest Communications that Japan has stopped all cold fusion research, but Applicant has demonstrated Japanese cold fusion efforts did preceed World War II (*supra*) and do continue and accelerate to this day, and in several Japanese laboratories and companies including Mitsubishi (*supra*). The Office was incorrect and that is important because Japan gives patents on cold fusion because technologies are important to Japanese security and consistent with the Japanese Constitution. Fewer patents are issued in Japan, but Japan issues patents on cold fusion.

The Office should issue the patent because the The US Patent Office has ignored the US Constitution and US security and US citizens' civil rights to withhold reasonable cold fusion patents even though "(m)ost patent applications submitted to the U.S. Patent and Trademark Office are approved". And they are, including astrology patents to predict lottery numbers. The mathematics of the Office's systematic discrimination and warfare upon the inventive American citizenry for fourteen years speaks indelibly for itself. The Office is in breach of its responsibility, and the aegis of authority granted to it by Congress under the United States Constitution.

123. Applicant taught in the original specification and claims how his apparatus works and claimed the invention. Applicant thereafter has made a diligent effort to amend the claims of this application so that Claims 1-10, 12-19, 21, and 22 define a novel structure which is also submitted to render said claimed structure unobvious because it produces new and unexpected results. Applicant has herein demonstrated that any combination of Westfall or Kinsella or Patterson and/or the other cited art is an improper one, absent any showing in the references themselves that they can or should be so combined, and that neither of the references appears to suggest, or allude to, or teach a structure as defined by the teachings of the original specification of the above-entitled application or claimed by Claims 1-10, 12-19, 21, and 22. Applicant has explained in detail (*supra*) how the other cited art are different and therefore produce a different result from the present invention. The figures and claims of Westfall or Kinsella or Patterson and the other cited art are intended to, and do, serve a different purpose than does the structure defined by the claims, and each of the cited art adds nothing of substance. None of the cited references shows a two-stage process involving loading of hydrogen into a metal electrode such as palladium, including a first stage of electrode loading, followed by, a second stage of sudden rapid ('catastrophic') flow of the loaded hydrogen within the metal and means to extract product using magnetic field inhomogeneity, based differential magnetic susceptibilities -- as the Examiner inaccurately purports.

124. Applicant has given lists of additional critical features and components which distinguish Applicant's invention to operatively function in a different manner compared to said cited art. The Office should issue the patent because Applicant has met --and exceeded-- the requirements specified by the standards of review. The Office should issue the patent because the Applicant has supported his work with both peer-reviewed publications and Declarations. The Office should issue the patent because it has been disingenuous. For example, in the Office's latest Communications it purports that Japan has stopped all cold fusion research, but Applicant has demonstrated Japanese cold fusion efforts did preceed World War II (*supra*) and do continue and accelerate to this day, and in several Japanese laboratories and companies including Mitsubishi (*supra*). The Office was incorrect and that is important because Japan gives patents on cold fusion because technologies are important to Japanese security and consistent with the Japanese Constitution. Fewer patents are issued in Japan, but Japan issues patents on cold fusion.

The Office should issue the patent because the The US Patent Office has ignored the US Constitution and US security and US 'citizens' civil rights by withholding reasonable cold fusion patents even though "(m)ost patent applications submitted to the U.S. Patent and Trademark Office are approved". And they are, including astrology patents to predict lottery numbers. The mathematics of the Office's systematic discrimination and warfare upon the inventive American citizenry for fourteen years speaks indelibly for itself. The Office is in breach of its responsibility, and the aegis of authority granted to it by Congress under the United States Constitution.

125. Based upon the facts cited here, and the submitted Declarations and the peer-reviewed published papers proving validation both *de jure* and *de facto*, these Claims 1-10, 12-19, 21, and 22 are patentable over the cited references because the claims recite novel structure and thus are distinguished physically over every reference [Sec. 102], with physical distinctions which effect new and unexpected results, thereby indicating that the physical distinction is simply not obvious [Sec. 103].

Applicant notes that the U.S. Supreme Court has ruled that any *pro se* litigant is entitled to less stringent standards [U.S. Rep volume 404, pages 520-521 (72)].

If this application is not allowed, and the Examiner continues to disagree with the numerous Affiants and peer-reviewed published papers, then the Applicant hereby formally requests explicitly that the Examiner respond in full with specificity as to the reason to facilitate Appeal, with the Examiner making clear on the record with precision which of these submitted averments by each Declarant regarding operability and utility were formally considered, and if the Examiner disputes them, exactly how he reached his conclusion, and why by substantive and adequate explanation how the Declarations failed to overcome the *prima facie* case initially established by the Examiner.

WHEREFORE for the above reasons, including submitted Declarations and the peer-reviewed published papers proving validation both de jure and de facto, the Applicant respectfully requests reconsideration and reversal of Claims 1-10, 12-19, 21 and 22 are rejected under 35 U. S. C. 102(b) as being anticipated by Westfall (US 5,215,631), Claims 1, 2, 4, 5, 7, 10, 13, 15, 16 and 21 are rejected under 35 U.S.C. 102(b) as being anticipated by Kinsella et al.(US 3,682,806), Claims 1-8 and 13-16 are rejected under 35 U.S.C. 102(b) as being anticipated by Patterson (US 5,318,675) or Patterson (US 5,372,688), and all Claims 1-10, 12-19, 21, and 22 rejected under 35 U.S.C. 112, 1st and second paragraph and 35 U.S.C. 101 by the Examiner, based upon flawed reference to other art ("FP" or "F+P") rather than the present invention, as is just and reasonable.

Respectfully submitted,



Mitchell R. Swartz, ScD, MD, EE  
Weston, MA

### Certificate Of Mailing [37 CFR 1.8(a)]

January 4, 2004

To Whom it Does Concern:

I hereby certify that this correspondence will be deposited with the United States Postal Service by First Class Mail, postage prepaid, in an envelope addressed to  
"Office of the Clerk  
Board Of Patent Appeals  
c/o The Commissioner for Patents  
Alexandria, VA 22313-1450" on the date below.

Thank you.

Sincerely,  
January 4, 2004



M.R. Swartz

## APPENDIX A

## THE CLAIMS INVOLVED IN THE APPEAL

'765

1. In a process for producing a product using a material which is electrochemically loaded with an isotopic fuel, a method of controlling the loading which includes in combination:

loading said isotopic fuel into said material,  
then providing means for producing a change in the quantity of said isotopic fuel within said material,  
creating thereby a catastrophic diffusion flux of said isotopic fuel within said material,  
providing a diffusion barrier to said diffusion flux of said isotopic fuel within said material,  
means thereby producing said product.

2. A method as in claim 1 wherein said material is a member of the group consisting of palladium, Groups IVb, Vb, and rare earth elements.

3. A method as in claim 1 wherein said loaded isotopic fuel is a member of the group consisting of deuterium or deuterons.

4. In a process using an isotopic fuel loaded into a material, a two-stage method for controlling the loading which includes in combination:

loading said isotopic fuel into said material,  
then providing means for producing a change in the quantity of said isotopic fuel within said material,  
creating thereby a catastrophic diffusion flux of said isotopic fuel within said material.

5. (amended) A method as in claim 4 wherein said loaded material is a member of the group consisting of palladium, Groups IVb, Vb, and rare earth elements.

6. A method as in claim 4 wherein loaded isotopic fuel is a member of the group consisting of deuterium or deuterons.

7. A method as in claim 4, where the material is loaded electrochemically.

8. A method as in claim 4, where the said means to produce a change in the quantity of said isotopic fuel within said material is by a change in temperature of said material.

9. A method as in claim 4, where the additional step is taken of obstructing the diffusion flux of said fuel by a diffusion barrier located within said material.

10. A method as in claim 4, where the additional step is taken of removing said product produced.

11. (cancelled without prejudice) A method as in claim 10 wherein said product is heat and said means of removing heat utilizes a member of the group of high thermal conducting devices, including a thermal pipe, a diamond filament, and a polymer filled with diamonds.

12. A method as in claim 10 wherein said means of removing said product utilizes an applied spatially inhomogeneous magnetic field.

13. An apparatus to produce a product using a material loaded with an isotopic fuel, which includes in combination:

means to load said isotopic fuel into said material,

means to produce a change in the quantity of said isotopic fuel within said material,

means to produce a catastrophic diffusion flux of said isotopic fuel within said material,

means thereby to produce said product.

14. An apparatus as in claim 13 wherein the isotopic fuel is a member of the group consisting of deuterium or deuterons.

15. An apparatus as in claim 13 wherein said said material is a member of the group consisting of palladium, Groups IVb, Vb, and rare earth elements.

16. An apparatus as in claim 13 wherein said means to load said isotopic fuel into said material is electrochemical.

17. An apparatus as in claim 13 wherein additional means are provided to obstruct the diffusion flux of said isotopic fuel by a diffusion barrier located within said material.

18. An apparatus as in claim 17 wherein said diffusion barriers are multiple and are arranged as alternating layers of diffusion barriers.

19. An apparatus as in claim 13 wherein the means produce a change in the quantity of said isotopic fuel within said material is by a change in temperature. *active*

20. (cancelled without prejudice) An apparatus as in claim 13 which includes a high modulus incompressible structural barrier surrounding said material filled with said isotopic fuel.

21. A method as in claim 1, where the additional step is taken of removing said product produced.

22. A method as in claim 21 wherein said means of removing said product utilizes an applied spatially inhomogeneous magnetic field.

## APPENDIX B

### ICCF10: A Message from the Front

As we send this issue of Infinite Energy to our printing company in Manchester, New Hampshire in early September, we have just returned from the exhilarating Tenth International Conference on Cold Fusion (ICCF10) in Cambridge, Massachusetts, very near and also at MIT. Yes, there was an historic set of excess-heat-producing cold fusion demonstrations at Prof. Peter L. Hagelstein's offices at MIT in the Dept. of Electrical Engineering and Computer Science! There is a staggering amount of news about cold fusion and low-energy nuclear reactions (LENR) to report from the conference (a lot to digest even for a veteran attendee of ICCF's). Time and space do not allow a lengthy report in this Infinite Energy, but it is likely that by the time you receive this issue I will have posted a special review of ICCF10 on our web site [www.infinite-energy.com](http://www.infinite-energy.com). Of course, there will be a full hard-copy report in the next issue of the magazine (out in November), and readers should also consult the material being posted on [www.lenr-canr.org](http://www.lenr-canr.org). Infinite Energy's non-profit New Energy Foundation, Inc. plans to offer soon one or more DVD's that will highlight important conference lectures & possibly a set of DVD's covering the entire conference.

For now and to whet your appetite for more information, here are some of the high points to be taken from ICCF10:

During ICCF10, Dr. Mitchell Swartz's palladium Phusor/low electrolyte conductance heavy water/platinum cell performed flawlessly in Prof. Hagelstein's lab at MIT. Its excess power ranged from 167% to 267% as Dr. Swartz altered the experimental conditions. This excess heat, as measured by his precision calorimeter, persisted from Sunday August 24 to August 30, longer than ICCF10 itself. The excess heat was interrupted on the last day only to bring the equipment back to Wellesley, MA, otherwise it would have continued much longer.

Prof. John Dash of the physics department at Portland State University in Oregon and his summer high school student interns also put on historic demonstrations of excess heat at Prof. Hagelstein's lab. They used simple but effective calorimetric apparatus, which allowed observers to check the level of excess heat for themselves. This proves that even high-school students can be more effective on the frontiers of science than the US Department of Energy and the 1,000-plus MIT professors who did not attend ICCF10. Only two MIT professors attended & Prof. Hagelstein and ex-Prof. Keith Johnson, both of whom have been involved in the field since its early days. (This, despite the 150 to 200 ICCF10 posters that I had earlier placed around MIT and a prominent ad in the Boston Globe which Prof. Hagelstein paid for from his personal

funds.) Only a few MIT students showed up (outnumbered by the high-school students in Prof. Dash's group from Portland State University in Oregon. (It should be noted that the both the Boston Globe and the Boston Herald chose to boycott the conference, despite having been repeatedly alerted about its significance.)

Helium-4 correlated with excess heat has been observed now in a solid-state LENR device by a laboratory effort sponsored by the Italian government. The astonishing nuclear transmutation experiment carried out by the Iwamura group at Mitsubishi Heavy Industries Advanced Technology Division, which was reported in *Infinite Energy* (No.47, pp.14-18) and later published in the *Japanese Journal of Applied Physics* has now been reproduced by the A. Takahashi group at Osaka University. In this experiment, deuterium (heavy hydrogen) gas is made to flow through a palladium membrane onto which another element, such as cesium or strontium, has been deposited. With no energy input (other than the pressure of the gas) the deposited element transmutes to another element. For example, cesium declines and the rare earth element praeodymium appears and grows. Or, strontium declines and molybdenum grows. The term 'grow' is appropriate, since to make the new elements, it is necessary for the starting nuclei to 'absorb' four deuterium nuclei! Obviously, this flies completely in the face of every cannon of basic chemistry, but the evidence for the result is now overwhelming. It is nothing short of modern alchemy.

There is much more, but I need to end these highlights. Though the 'cold fusion war' has not yet been won and it could still be lost, the field seems to have picked itself up with the remarkable turning point of ICCF10.

Dr. Eugene Mallove  
September 2, 2003

ZerÆpoint®  
8200A Bull's Ferry Rd. #2  
North Bergen, NJ 07047

September 1, 2003

Mr. Al Gore

Dear Al,

... My more strategic issue concerns energy. I've included some articles with the same kind of investigative details about First Energy and their links to the current "ruling faction" in Washington. However, I've also included the list of attendees from last week's "10th International Conference on Cold Fusion" and highlighted some of the names, titles and entities the attendees represented. No, cold fusion is not yet ready for full-scale commercialization. Yes, cold fusion is real and deserves research funding. Interestingly, Dr. Peter Hagelstein of MIT was the conference chair. He did a magnificent job. There was even a "field trip" from the hotel where the conference was held in Cambridge, to Room 568 in Building 36 at MIT where a live "overunity" (more-power-out-than-in) cold fusion experiment was hosted by Dr. Mitchell Swartz.

I learned first-hand at this conference that the very academic "cold fusion community" is far more interested in determining the physical and chemical equations in the languages they know than they are in understanding how the simple spark has enough energy in it to melt aluminum. They appear to go to great lengths to overcomplicate things, but that is understandable, since it conforms to the paradigms they are most accustomed to. .... Two names on the conference attendee list are from Toyota Central R & D. Labs. This was most encouraging, since Toyota funded Fleischmann and Pons in France after they were "run out of town" by the American Physical Society in 1989-1990. In my letter of 7/31 to Mr. Toshiaki Taguchi, president & CEO of Toyota Motor North America, I asked Toyota to fund research into "new energy" in a new way, using a recently updated version of the artificial intelligence application that IBM used to defeat Gary Kasparov in chess in the mid-'90's. My proposed approach would include analyzing the data from ALL new energy experiments (at least as many as possible that are published) to factor out the "least common denominator(s)" in them.

Let's apply a methodology with a proven track record for determining optimal logical strategies to the search for an appropriate energy alternative to oil, gas and current-day fission nuclear power, none of which are clean, safe or economical.

Yours truly,  
John Miranda, President  
ZerÆpoint®